Judgments
# of the Administrative Tribunal of the International Labour Organization:
88th Session
(November 1999 - February 2000)

International Labour Office
Geneva

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The jurisdiction of the Administrative Tribunal has been recognised by the following organisations (in order of recognition):

International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
World Trade Organization (WTO)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organization for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)
International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)
International Organization for Migration (IOM)
International Centre for Genetic Engineering and Biotechnology (ICGEB)
Organisation for the Prohibition of Chemical Weapons (OPCW)
International Hydrographic Organization (IHO)

Energy Charter Conference (ECC)
International Federation of Red Cross and Red Crescent Societies
Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

Judgment 1891

***In re* Durand-Smet (No. 3)
(Application for execution)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the execution of Judgment 1832 filed by Mr Jérôme Durand-Smet on 28 May 1999, the reply of 19 August from the European Patent Organisation (EPO), the complainant's rejoinder of 14 September and the Organisation's surrejoinder of 28 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The facts at the origin of this dispute are set out in Judgments 1559 and 1832 on Mr Durand-Smet's first and second complaints. The complainant joined the EPO as an examiner at Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, at The Hague. He was transferred to DG2 in Munich, where his last promotion was to grade A4, and in April 1991 he applied for an A5 post as a member of a technical board of appeal at DG3. His application was unsuccessful as the Administrative Council, the competent authority for such appointments, had selected an A3 official for the post. His first complaint, in which he asked to be appointed retroactively instead of the successful candidate, was dismissed as obviously out of time.

In 1996 he applied for a similar vacancy, but was again unsuccessful, the President of the Office having refused to put his name to the Administrative Council. His appeal against that decision was rejected by the President of the Office on the recommendation of the Appeals Committee. In Judgment 1832 the Tribunal quashed the President's decision on the grounds that he took it without authority, the competent body for appointments and appeals being the Administrative Council. The complainant had also submitted a claim for damages, which the President was competent to entertain, but the Tribunal disallowed it on the same grounds as it gave in Judgment 1559, insofar as it was *res judicata*. As a consequence the case was sent back to the Administrative Council.

On 17 November 1997 the complainant filed a second internal appeal with the Chairman of the Administrative Council asking him to "either delete a comment from the minutes of the meeting of the Selection Board of DG3, dated 3 May 1996, or failing that to disclose the minutes to him".

In another internal appeal filed on 6 February 1997 to the President of the Office, the complainant sought the quashing of the appointments of members of technical boards of appeal and of their renewal in 1989 and 1996, and challenged the refusals to appoint and promote him in 1991 and 1993.

By a letter of 28 April 1999 the Chairman of the Administrative Council informed him that, at its 75th session, the Council had decided to reject the three appeals. Pursuant to Judgment 1832, the Council had recognised that it was competent.

The Council referred the three appeals to its Appeals Committee.

Without awaiting a new decision resulting from that procedure, the complainant has filed a complaint with the Tribunal asking it to quash the decision of 28 April 1999 and to allow the claims in his internal appeals. He refers to his complaint as an application for execution and appeal against the Council's rejection of his three internal appeals.

The EPO submits that the complaint is devoid of merit – as an application for execution – and otherwise irreceivable because the internal remedies were not exhausted.

2. According to precedent an application for execution does not require the internal remedies to have been exhausted (see Judgments 1887 (*in re* Argos No. 3 and others), under 5, 1771 (*in re* De Riemaeker No. 4), under 2(b), and the precedents cited therein). Insofar as it seeks the execution of Judgment 1832 the complaint is therefore receivable.

(a) Judgment 1832 upheld the President's decision insofar as it rejected the claim to damages (consideration 2, and point 4 of the Tribunal's decision), but otherwise set it aside because the competent body was not the President but the Administrative Council (considerations 3 to 6, and point 1 of the Tribunal's decision). It also stated expressly that a ruling on the merits was premature (consideration 7).

Since the Administrative Council recognised that it was competent and ruled on the claims in question, it fully executed Judgment 1832. To that extent, the complainant has no cause of action.

(b) He also contends, however, that Judgment 1832 set aside the decision appointing another candidate to the post he wanted. But he has misread the text and the meaning of the judgment; his plea is all the more unsustainable because the impugned decision came from the President of the Office and not from the appointing authority.

To that extent, the application for execution is clearly unfounded.

3. In all other respects the impugned decision concerns the merits. It was referred to the Council's Appeals Committee for a recommendation following which the appointing authority would give a final ruling on the internal appeals. When this complaint was filed, the internal remedies had therefore not been exhausted (Article VII(1) of the Statute of the Tribunal).

The Tribunal sent the case back to the Organisation not out of any desire to be excessively formal or because of a lack of good faith, but so that a proper procedure could be conducted before the Administrative Council. The Organisation, for its part, does not object to this requirement. The (new) Appeals Committee of the Council has not yet had an opportunity to give an opinion on the merits of the dispute, the solution of which may to some extent be discretionary. In these circumstances, it is clearly not asking too much of the complainant that he observe the rules of procedure for appeals set out in the Service Regulations.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

Judgment 1892

***In re* Salard No. 4**
(Application for execution)

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the execution of Judgment 1814 filed by Mr Jean-Claude Salard on 1 April 1999 and corrected on 16 April, the reply of 11 June from the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), the complainant's rejoinder of 28 June and Eurocontrol's surrejoinder of 30 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment No. 1814 delivered on 28 January 1999 on two complaints filed by Mr Salard, the Tribunal set aside a decision of the Director General of Eurocontrol rejecting the complainant's appeal to have his mother treated in the same way as a dependent child. It sent the case back to the Organisation and ordered the latter to pay Mr Salard 35,000 Belgian francs in costs. In a complaint filed with the Office of the Registrar of the Tribunal on 1 April 1999, he submits that Eurocontrol has failed to execute the judgment, in particular point 3 of the decision ordering the Organisation to bear the costs. In addition to these costs plus 10 per cent interest, he asks that the Organisation be ordered to pay him 50,000 francs in costs and 500,000 francs in moral damages.

2. Eurocontrol contends that it has fully executed the judgment: on 21 February 1999 it paid Mr Salard costs and resubmitted the initial claims, which had resulted in the quashed decision, within a reasonable time to the Joint Committee for Disputes. Eurocontrol deems that the suit is vexatious and intended to involve it in needless costs. It requests that the complainant be ordered to reimburse expenses charged to it following the Tribunal session.

3. The Tribunal can only express surprise that on 1 April 1999 the complainant should file a suit to obtain payment of a sum of money which had been transferred to his bank account on 21 February 1999, barely three weeks after the judgment had been delivered. In an e-mail message of 4 May 1999, the complainant admits that he had been "unaware" that the payment had been made and that the problem had been settled "promptly". In these circumstances it is difficult to understand why he did not withdraw claims which were clearly unfounded and obviously must be dismissed.

4. As to the claims relating to the failure to execute the judgment sending the case back to the Organisation for a new ruling on his appeal, they too must be disallowed because the matter was referred back to the Joint Committee for Disputes within a reasonable time. The Committee met on 23 March 1999 and issued a negative recommendation on 21 April 1999. The Director General endorsed it, dismissing the appeal on 5 May 1999. The procedure necessitated by the judgment quashing the original decision was therefore implemented swiftly. As the Organisation emphasises, it was appropriate to resume the procedure by referring the matter back to the Joint Committee for Disputes because it was the unlawful nature of the latter's opinion that led to the quashing of the decision. However, proper execution of the judgment did not necessarily imply recognition that the complainant's appeal was sound: all that was required was a new decision taken after due process. The question of the lawfulness of this new decision is dealt with in another complaint ruled on this day (*in re* Salard No. 5, Judgment 1893), but the complainant's objections to the time limits observed by the Organisation in resuming the procedure to execute Judgment 1814 can only be dismissed.

5. In view of the foregoing, the Organisation's claim that the suit filed by the complainant be considered as vexatious and pointless should be examined closely. The Tribunal believes that it must fail because a letter of 30 March 1999 sent by the Director of Human Resources to the complainant may have misled him as to the Organisation's intention to execute the judgment. This letter merely indicated that Mr Salard's complaint would be "sent back to the Joint Committee for Disputes", whereas the Committee had in fact met on 23 March. Furthermore, taking account of the rules applying at the time when his mother had become a "long-term" patient, the execution of the judgment was to remain "virtual". It is possible that such an expression, which the Organisation admits was "unfortunate", could have led the complainant to doubt its intention to execute the judgment and to file an application for its execution, however slim the grounds. Therefore, the claim to an award of costs against the complainant must be dismissed.

DECISION

For the above reasons,

1. The application is dismissed.
2. Eurocontrol's counterclaims are dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Salard (No. 5)** **Judgment 1893**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr Jean-Claude Salard on 18 May 1999, Eurocontrol's reply of 30 July, the complainant's rejoinder of 10 August and Eurocontrol's surrejoinder of 15 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 1814 delivered on 28 January 1999 on Mr Salard's second and third complaints.

By a letter of 5 February 1999, the complainant asked the Director General to have his mother treated as his dependant as from 1 December 1997 in accordance, he claims, with Rule of Application No. 7 and Judgment 1814. In addition he asked that this dependent status be renewed from 1 December 1998 to 30 November 1999. Following a telephone conversation, the Director of Human Resources informed the complainant by a letter of 30 March 1999, that office notice 41/72 "on which the Tribunal had based its judgment" had been revoked and that his request of 1 December 1997 would be examined in the light of office notice 15/97 of 15 September 1997. He added that "as for the actual execution of Judgment 1814, it shall remain virtual" and said that the internal complaint filed by Mr Salard on 3 June 1997 would be sent back to the Joint Committee for Disputes for a recommendation. However, the Committee had already met on 23 March 1999. In its report of 21 April, it recommended unanimously rejecting his request to have his mother treated as his dependant. In a letter of 5 May 1999, the impugned decision, the Director of Human Resources informed the complainant on the Director General's behalf that he had endorsed the Committee's recommendation.

B. The complainant submits that the Joint Committee for Disputes had met "in virtual secrecy" without having been properly convened and without hearing him. He questions the impartiality of some of its members. He points out that the report of 21 April 1999 bore only the Chairman's signature and accuses the Committee of serving as an appeals body for Tribunal judgments. He objects that office notice 15/97 refers expressly to the remuneration of officials of the European Union, whereas, according to him, Judgments 1095 (*in re* Gilles) and 1814 had already declared that practice unlawful in Eurocontrol. He adds that some annexes to the office notice had not been written until October 1997 and so could not have been submitted in the advisory procedure which took place on 4 August 1997. Lastly, the method of reckoning set out in the office notice has led to "obvious aberrations" because it has not taken into account the actual expenses borne.

In his complaint form, the complainant seeks the quashing of the impugned decision, one million Belgian francs in moral damages and 50,000 francs in costs. In his attached brief, he also seeks the cancellation of the implied rejection of his request for renewal of his mother's status as a dependant.

C. In its reply, Eurocontrol recognizes that the use of the phrase "virtual execution" of the judgment by the Director of Human Resources was poorly chosen; it explains that the discrepancy between the date of the letter announcing that the Joint Committee for Disputes was going to meet and the actual date of the meeting was due to the fact that the letter had been signed late.

Eurocontrol contests the receivability of the claim to renewal of the status sought for his mother on the grounds that the complainant failed to exhaust his internal remedies. In its view, the request he submitted on 5 February 1999 is a new one.

On the merits, Eurocontrol explains that the complainant's claim was reviewed in the light of office notice 41/72, in force when the first request was made, which gives the Director General a wide measure of discretion. Like the Committee before him, the Director General considered that although the complainant undeniably had to bear heavy costs, they were not such as to warrant the exceptional measure of having his mother treated as his dependant. Eurocontrol points out that the Committee is not obliged to hear complainants or inform them when the internal complaints will be examined. According to office notice 6/95 setting up the Joint Committee for Disputes, the Chairman signs the report.

In a subsidiary argument, Eurocontrol submits that the Tribunal never intended to prohibit it from taking up rules from other organisations by publishing them as its own.

D. In his rejoinder the complainant denies having made a "new" request in his letter of 5 February 1999. He simply asked that his request of February 1997 be reconsidered in the light of Judgment 1814, as well as, *mutatis mutandis*, his request to have his mother treated as his dependant, annually renewed. Since the objective of his request was to obtain "the full and entire execution" of Judgment 1814, he considered that he was "exempted from following the internal appeals procedure".

He reiterates his objections concerning the Joint Committee for Disputes.

Lastly, he affirms that he does meet the requirement of "heavy expenditure" provided for in Article 2(4) of Rule of Application No. 7 concerning remuneration.

E. Eurocontrol submits in its surrejoinder that decisions regarding special dependent status are only valid for one year. Therefore, no yearly renewal, *mutatis mutandis*, is possible. It argues that the request can stand on the strength of neither office notice 41/72 nor office notice 15/97 and recalculates the costs borne by the complainant to prove that these are well below the ceiling set for "heavy" expenditure. In its view, Judgment 1814 ordered the review of the claims of 3 June 1997 but did not rule that it was sound. Therefore, it had sent the case back to the Joint Committee for Disputes before taking a new decision, and the procedure it followed was a regular one.

CONSIDERATIONS

1. The complainant is an expert at Eurocontrol's Experimental Centre at Brétigny-sur-Orge in France. He submitted a request on 7 February 1997 which the administration construed as a request to have his mother, who was to be admitted to a hospital as a long-term patient, treated in the same way as a dependent child. After the Joint Committee for Disputes had been consulted, his request was rejected by a decision of 30 October 1997, which he impugned before the Tribunal. By Judgment 1814 delivered on 28 January 1999, the Tribunal ruled that the Committee's recommendation had been issued in unlawful circumstances. As to the merits, the administration had wrongfully referred to the rules applicable to officials of the European Union.

2. As early as 5 February 1999 the complainant submitted a two-fold request to the Director General of Eurocontrol based on Judgment 1814: first, that his mother be treated as his dependant as from 1 December 1997; secondly, that this status be renewed from 1 December 1998 to 30 November 1999. Eurocontrol referred the matter to the Joint Committee for Disputes as it was bound to do following Judgment 1814. Having met on 23 March 1999, the Committee made its recommendation on 21 April based on the following considerations:

> "From the information provided by Mr Salard, it appears that his part of the maintenance of his mother is undeniably a burden. Nevertheless, it is not so "heavy" as to warrant treating Mrs L. as a dependent child according to the terms of office notice 41/72, which moreover grants broad discretionary authorities to the Director General.
>
> By office notice 15/97 of 15.09.97, effective from the same day, Eurocontrol informed its employees of the provisions and requirements relating to the treatment as a dependent child.

> These requirements are the same as those relied on by Eurocontrol in the first office notice, 41/72, to refuse the request to have Mr Salard's mother treated as a dependent child."

The Committee ruled unanimously that

> "Mr Salard's claim to dependent status for his mother cannot stand, for it fails to meet the requirements listed in office notices 41/72 and 15/97".

3. By a decision taken on 5 May 1999, the Director of Human Resources, on the Director General's behalf, stated that he fully endorsed the recommendation of the Committee and informed the complainant that "the request that [his] mother be treated as his dependant is rejected". The complainant's main claims are to quash this decision and to grant him one million Belgian francs in moral damages. He also filed an application for execution, which the Tribunal has dismissed this day in Judgment 1892.

4. To grasp the extent of the dispute as it now stands before the Tribunal, it is necessary first to consider a point of law and a point of fact.

5. In law, as stressed both by the Joint Committee for Disputes and Eurocontrol, the rules for classifying an individual in the same way as a dependent child of an eligible official of Eurocontrol have been amended. Until 15 September 1997 office notice 41/72 of 31 October 1972 was applicable. It recalled the terms set out in Article 2(4) of Rule of Application No. 7:

> "Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child, by special reasoned decision of the Director General, based on supporting documents."

The office notice specified the factors to be considered in examining the requests, but did not clearly define "heavy expenditure". As from 15 September 1997 office notice 15/97 of the same date is applicable: an annex to this office notice fixes a method of reckoning for expenditure borne by officials which is identical to the one applied to officials of the European Union.

6. In fact, a study of the case reveals that although the complainant had indicated in his first request that his mother would be admitted as a

long-term patient as from 20 February 1997, she was not actually admitted until 20 November 1997.

7. The complainant submits that the decision of 5 May 1999 to refuse his request is unlawful because it was taken after an irregular meeting of the Joint Committee for Disputes and it was in breach of Judgment 1814. He challenges the dismissal both of his claim to treat his mother as his dependant and his request for an annual renewal of this status. Eurocontrol argues that the claims relating to the periods from 1 December 1997 to 30 November 1998 and from 1 December 1998 to 30 November 1999 are irreceivable and asks that his other claims be dismissed because they are unsound.

8. Contrary to Eurocontrol's assertion, the complainant's claims are all receivable, even though he merges the periods over which he requests to have his mother treated as his dependant. The wording of both the request of 5 February 1999 and the recommendation of the Committee does however indicate that the dispute concerns both the request submitted initially on 7 February 1997 and the request for renewal of the special status until 30 November 1999. As for the impugned decision, it is couched in general enough terms to cover the entire period. The complainant may therefore challenge the rejection of both his request of 1997 and that of 1999.

9. Although his claims are receivable, they are devoid of merit.

First, contrary to the complainant's contentions, Judgment 1814 did not imply that his case succeeded on the merits; its sole objective was to send the case back to Eurocontrol's competent bodies so that a lawful decision could be taken.

Secondly, there is nothing in the evidence to suggest that the Joint Committee for Disputes met in irregular circumstances: it delivered its opinion after having examined the complainant's written submissions and was not bound to summon him for a hearing. Further, there is no evidence to support the allegation that Committee members were biased and so incapable of giving a fair opinion on his claims. The complainant's pleas on form, which are subsidiary, must fail.

Finally, on the merits, the impugned decision correctly applied the relevant provision: for the period prior to 15 September 1997, the argument became theoretical since it appears that the complainant's mother did not become a long-term patient until after that date. Since the case involves periods during which the complainant's mother was actually a long-term patient at the hospital, Eurocontrol rightfully applied the method of reckoning defined in office notice 15/97 which is perfectly lawful. The complainant has failed to prove that the calculations, on which Eurocontrol based its rejection of his request, were wrong. Therefore, his complaint, as well as his claims to payment of moral damages and costs, must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

Judgment 1894

***In re* Müller-Engelmann**
Nos. 4, 5 and 6

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth and fifth complaints filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 3 March 1998, her sixth complaint against the Organisation filed on 9 March, the EPO's single reply of 23 June, the complainant's rejoinder of 30 September, and the Organisation's surrejoinder of 10 December 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 1829 on the complainant's first complaint. At the material time she was employed by the European Patent Office, secretariat of the EPO, in Munich, as an examiner at grade A3.

In August and September 1997 the complainant submitted three claims for reimbursement of medical expenses totalling 20,244.94 German marks to Van Breda, the insurance brokers responsible for the day-to-day administration of the collective insurance contract concluded by the EPO. In September and October Van Breda sent her the corresponding settlement notes which showed that it was withholding payment against some of the bills. In letters that followed Van Breda informed her that it was "thoroughly looking into these bills". Van Breda then wrote to the doctors concerned asking them to provide information confirming the "ascertained diagnosis".

The complainant filed three internal appeals with the President of the Office against the non-reimbursement of those expenses within the fifteen-day time limit prescribed in Article 23 of the collective insurance contract. She lodged another appeal with the President against Van Breda's action of contacting her doctors and medical laboratories in order to obtain information about her laboratory results. In a letter of 31 October 1997 the Director of Personnel Development told the complainant that since her claims were still being processed by Van Breda and her doctors had been asked to provide further information a final decision had yet to be made on them.

On 13 March 1998 Van Breda wrote to the complainant saying that its medical adviser would not be able to take a decision until it had the required information and that if no reply was received within three months the invoices would be returned to her. It forwarded to her copies of the reminders that had been sent to her doctors and the medical laboratory. One doctor did send the information asked for, but some of the others replied that without the complainant's authorisation they were unable to forward any details.

On 6 May 1998 the complainant was informed by Van Breda that, in the absence of the required medical information, no decision could be taken regarding the outstanding medical expenses. The complainant states that in the absence of a reply from the President to her internal appeals, she has filed these complaints with the Tribunal.

B. The complainant contends that her complaints are receivable under Article VII(3) of the Tribunal's Statute because the President did not act within sixty days of the filing of her internal appeals as provided for in Article 109(2) of the Service Regulations.

On the merits, she argues in all three complaints that Van Breda's failure to reimburse her medical expenses is unlawful. It should have ordered reimbursement within fifteen days of receiving her claims. Moreover it has no right to contact her doctors or the laboratories without her authorisation. She only learned through some of her doctors that Van Breda had written to them, and she is unaware whether it has contacted any of her other doctors.

In her fourth complaint she says that as Van Breda has received some information from her doctors, the "patient's right of informational self-determination" obliges it to return all of this information to her. In that complaint she asks the Tribunal to direct Van Breda to deliver to her all of the information received from her doctors and to provide her with a list of all the "physicians and hospitals" that it has contacted.

In all three complaints she asks the Tribunal to order the EPO: to reimburse her for a number of medical bills totalling 12,451.12 German marks plus 14 per cent interest from dates she specifies; to direct Van Breda not to contact her doctors without her authorisation; to compensate her for translation and copying costs; and to pay the "actually incurred amount of [her] related non-legal and legal expenses".

C. In its reply, the Organisation requests the joinder of the fourth, fifth and sixth complaints, since they relate to Van Breda's refusal to reimburse medical expenses and claim interest for late payment; and it submits an identical reply dealing with all three complaints.

The defendant submits that the complaints are not receivable because the complainant has not exhausted the internal means of redress. Pursuant to the second paragraph of Article 90(1) of the Service Regulations, it is the Invalidity Committee, rather than the internal Appeals Committee, which has the competence to consider medical disputes such as the reimbursement of medical expenses. There is no final decision at issue: Van Breda has been unable to arrive at a final decision on the contested expenses as it has not received the information it requested. There is also no indication that her appeal lodged against Van Breda's request to her doctors will not be considered within a reasonable amount of time, and so the conditions for filing a complaint under Article VII(3) of the Tribunal's Statute have not been met.

In addition, her complaints are devoid of merit. Citing Judgment 1288 (*in re* Fessel) which concerned another dispute with Van Breda, the Organisation contends that insurers are "entitled to information which identifies the nature of the ailment and enables them to determine whether the prescribed treatment is appropriate". An official requesting reimbursement is obliged to contribute by supplying such information. Without it, Van Breda is justified, after setting a reasonable time limit, in rejecting the expenses definitively. The EPO states that the complainant "has only herself to blame".

The Organisation rejects her requests for legal fees, and translation and copying costs.

D. In her rejoinder, the complainant argues that her complaints are receivable in the absence of a ruling on her internal appeals and enlarges on her pleas. The internal Appeals Committee supersedes the Invalidity Committee in cases of medical disputes. Under the second paragraph of Article 90(1) of the Service Regulations, the Invalidity Committee is responsible for ruling on all disputes relating to medical opinions expressed, on the one hand by the medical officer appointed by the President of the Office and, on the other hand, by the civil servant concerned or his/her physician. In her case, the EPO's medical officer has not performed any examination, and no medical dispute exists between this officer and the complainant or her doctor.

Further, Van Breda's assertion that it was looking into her bills gave her no reason to assume that a medical dispute existed and that she should apply for the convening of the Invalidity Committee. If the EPO is of the opinion that this Committee was the competent body, the President should have convened it, which he did not.

She argues that Van Breda cannot refuse to reimburse her medical expenses on the grounds that it is not in possession of additional information from the doctors and the laboratory because it already has her doctors' invoices which contain clear diagnosis details. She does not dispute Van Breda's general entitlement to information to the extent that it is required for purposes of examining its obligation to reimburse expenses; however, the insurer's entitlement is not unlimited. She has been willing to cooperate but as she was unaware of the nature of the problems involving the expenses she was unable to take any steps to clarify them.

With respect to the bills in question, it is obvious that Van Breda is impugning the "diagnoses per se" because most of the refused invoices concern "pollutant intoxication". What is ultimately at issue is whether or not the costs incurred for the purpose of clarifying the cause of an ailment are reimbursable.

E. In its surrejoinder, the Organisation presses its objections to receivability. It points out that Van Breda and its medical adviser act in lieu of the EPO with regard to the reimbursement of medical expenses and the Invalidity Committee is only able to intervene once Van Breda has taken a decision.

The complainant could have asked Van Breda to explain the nature of the dispute before filing her appeals, or she could have intervened with her doctors to furnish the required information. After she received copies of the letters Van Breda sent to her doctors, she could no longer claim that she was unaware of the fact that its medical adviser was requesting further information supporting the medical diagnoses.

As is clear from her rejoinder, the complainant was aware that Van Breda's medical adviser was querying the matter of "pollutant intoxication" at issue in her first complaint. Given that "poisoning due to environmental factors is such a controversial issue", Van Breda is justified in asking for further information from the relevant doctors and laboratories. In exercising its "right of control", Van Breda is entitled to make reimbursement of any invoice dependent on a positive opinion from its medical adviser.

CONSIDERATIONS

1. These three complaints raise the same substantive issues and the Tribunal orders that they be dealt with jointly.

2. In all three complaints the complainant seeks repayment of certain medical invoices submitted by her to Van Breda for reimbursement. Some of the submitted invoices were accepted for reimbursement and some were refused outright as not being covered by the collective insurance contract; there is no substantive issue as to the latter.

3. With respect to all the remaining invoices, Van Breda informed the complainant that it was seeking further information from the relevant medical specialists who had submitted the invoices. The complainant took, and still maintains, the position that Van Breda is not entitled to seek this information because it is privileged.

4. The matter has been fully and conclusively dealt with by the Tribunal in Judgment 1848 (*in re* Müller-Engelmann No. 3). In that judgment the Tribunal said under 12:

> "As to the claim regarding the disputed invoices, the law is clear that Van Breda, as representing the insurer, is entitled to any information which identifies the nature of the alleged illness and allows it to determine whether the prescribed treatment is appropriate and necessary (see *in re* Fessel, Judgment 1288 under 7). Of course, the complainant is entitled to require that such information only be made available to Van Breda's medical adviser and be treated by the latter in confidence but she is not entitled to withhold from them any right of access whatsoever to the required medical information. Her unwillingness to allow such access goes against her duty to deal in good faith with her insurers. Moreover, there is no merit whatever to the complainant's argument that because the costs at issue here were incurred in the establishment of a diagnosis they must necessarily be allowed. The argument simply calls into question the existence of the alleged illness and the correctness of its diagnosis."

5. The Tribunal adds that it is not for the complainant, as she asserts in her pleadings, to judge whether the information requested by Van Breda

is necessary in order to enable it to assess her claims. That is a matter for the professional assessment of Van Breda and its medical adviser and the Tribunal would not interfere unless it was satisfied that the information was being sought for some abusive or improper purpose. There is no question of that here.

6. The complainant's assertion that some of the requests for information were vague or unclear is beside the mark. Since she takes the position that Van Breda has no right to request any information at all, she cannot argue that such requests should have been more detailed.

7. The Tribunal notes that Judgment 1848 was not released until after the close of pleadings in the present cases. It is surprised that the complainant did not discontinue her proceedings upon receipt of that judgment.

8. Since the complaints are devoid of merit, it is not necessary to deal with the question of receivability.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Roudakov**

Judgment 1895

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Vladimir Ivanovitch Roudakov against the World Health Organization (WHO) on 23 September 1998, the WHO's reply of 15 February 1999, the complainant's rejoinder of 8 April and the Organization's surrejoinder of 9 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Material facts relevant to this case are set out in Judgment 1883 on Mr Roudakov's motion for an interlocutory order granting interim relief. This motion was dismissed by the Tribunal.

B. The complainant states that during his appointment at the WHO as head of the Russian language translation subunit he was at all times a regular staff member and not on "true secondment" so there should have been a "valid and lawful reason" for the non-renewal of his contract. He has four pleas.

First, he challenges the lawfulness of the WHO's decision not to renew his contract. He contends that his status as a "seconded" staff member has never been defined in a formal tripartite agreement signed by him, the Ministry of Health of his country and the Organization as the

WHO itself stated was required by Judgment 1249 (*in re* Reznikov). A staff member cannot be deemed to be seconded simply because he was hired on the basis of an agreement between an organisation and the government of his country. He was not privy to all the terms and conditions of that agreement.

On 20 April 1993, pursuant to Judgment 1249, the Organization sent the complainant a memorandum requesting him to return it, indicating formally whether or not he wished to be considered as being on secondment. On returning it duly signed the complainant said that he "wished" to be considered as being on secondment; he also noted that he "did not understand what ... the new secondment rules" were. In fact they were never supplied to him. Nor did his acknowledgement of a similar memorandum in 1995 create a valid and legally binding agreement between himself, the Organization and the Government.

Moreover, the Director of the Division of Personnel acknowledged in a communication of 4 August 1997 that the sole reason for the non-extension of his contract was the request from the Ministry of Health of the Russian Federation that his contract should not be extended beyond the end of its term on 31 December 1997. The complainant refers to Article 37 of the WHO Constitution which states that its staff must not "seek or receive instructions from any government or from any authority external to the Organization" and to Staff Regulations 1.10 and 1.11 which require staff members to take an oath that they will not accept such instructions.

Secondly, the complainant pleads that errors of fact and law made the non-renewal of his contract "irregular and void". Despite repeated requests, the Administration refused to provide him with the grounds or the evidence it relied upon in asserting that he was formerly a member of the civil service of the Russian Federation, thus making his appointment at the WHO a secondment.

Thirdly, the impugned decision is void because the Organization failed to give him a valid and lawful reason for it. The WHO has not asserted that the complainant's service was unsatisfactory or that his post was abolished, which are the two main reasons for non-renewal of a contract. He alleges that his contract was not renewed because the Russian Federation wished to replace him with a "favoured" official. He adds that he had a reasonable expectation of renewal and accuses the WHO of bad faith and lack of consideration for his rights.

Fourthly, he submits that the actions of certain members of the WHO Administration were the result of "malice and prejudice". They failed to answer his inquiries about formalising his alleged secondment; they took instructions from the Russian Federation; they illegally made him unemployed; and they refused to grant him available short-term translation contracts after his separation from service. These actions have caused him grave injury which in his view justifies substantial moral damages and disciplinary action against the officials concerned.

The complainant requests the Tribunal to order the WHO to produce specific documents in their complete form "for inspection and review", in particular the full text of the letter from the Russian Federation which purported to instruct the WHO not to renew his appointment, but which has been provided only in a summarised version.

He seeks: (1) the quashing of the decision of the Director-General dated 26 June 1998; (2) the setting aside of the decision dated 1 July 1997 not to renew his contract; (3) the setting aside of the notice of non-renewal of contract dated 19 September 1997; (4) the official removal of those documents from his personal files; (5) "full and total reintegration" at the WHO retroactively from 31 December 1997 and an extension of contract for five years, from 1 January 1998 or from the effective date of his reinstatement, whichever date is later; (6) full restoration and payment of salary, benefits, adjustments and emoluments which would have been due to him had his contract been renewed with effect from 1 January 1998 to the date of his reinstatement at the WHO; (7) moral damages of at least 250,000 United States dollars for the WHO's "intentional and unjustifiable failure to abide by the holding of *in re* Reznikov in [his] case, and the moral injury suffered by [him] as a result of the WHO's irregular and illegal actions"; (8) interest at the rate of ten per cent per annum from 1 January 1998 to the date of "full and complete performance of any awards made by the Director-General pursuant to any judgment of the Tribunal hereunder"; (9) 15,000 Swiss francs in costs and legal expenses; (10) disciplinary measures against the WHO officials responsible for his separation from service; and (11) "such other relief as the Tribunal deems necessary, just and equitable".

C. The Organization replies that the complainant was a staff member on secondment while at the WHO and rejects the complainant's central plea that there was no formal tripartite agreement.

According to the Organization, in order to be valid a tripartite agreement need not be a single document bearing the signatures of all three parties. There was an "express" agreement evidenced by an exchange of correspondence between the three parties in 1993 and 1995 where: (1) the Organization sought and obtained the Ministry's express agreement on the extension of the complainant's secondment and its conditions; (2) the Organization conveyed the Ministry's consent to the complainant and its own wish to extend his appointment and sought his express concurrence; (3) the complainant unequivocally confirmed his agreement to the secondment and its conditions.

The complainant was given a clear choice between whether he wished to be considered on secondment or not and he freely chose the former option. Even though he queried the "modalities", and specifically the duration of the possible extensions of appointment, this did not alter in any way the essence of his agreement.

Further, the Organization contends that it did formalise the agreement by seeking the express consent of the parties in 1993 and 1995, and by revising Staff Rule 440 to embody the principle that a secondment and any extension required the agreement of the three parties concerned.

It also rejects the complainant's suggestion that he was not aware of the implications when he consented to the secondment agreements. In a memorandum dated 28 July 1995 he wrote: "taking into account that I am on secondment from my Government ...".

The WHO maintains that it secured an express undertaking from the Russian Federation in 1993 and again in 1995 that the complainant would be able to revert to his previous employment and retain all his rights and entitlements. The fact that the complainant was possibly dissatisfied with the employment offer made by his Government does not alter the fact that there was a secondment agreement. That one party might have subsequent difficulty in implementing an undertaking does not render a contract void. *In re* Reznikov is not applicable in this case. The Organization maintains that it acted correctly in taking into account the decision of the Russian Federation.

The complainant's claim that he was never a member of the civil service of the Russian Federation is contradicted by the fact that he had a diplomatic passport that is issued by the Russian Federation to civil servants of a higher rank.

The Organization states that its decision was free from any flaw, and "from any personal prejudice". It also rejects the complainant's claim for disciplinary measures against officials of the Organization as being irreceivable as it is a new claim and without merit.

D. In his rejoinder the complainant presses his pleas. The wording of the WHO's memorandum of 1993 gave him the choice of being considered on secondment under new rules. As is clear from the remark he wrote on signing the agreement, his assent was conditional.

There was an "unequal bargaining position" between him and the Organization because he was working without an extension of contract when he signed the 1995 agreement and he would have "signed anything the WHO put in front of him to maintain his position within the Organization".

Staff Rule 440.4 was promulgated after he signed the 1993 memorandum, and the WHO had a duty to bring it to his attention – which it did not.

The complainant states that he was never an official of the Russian Ministry of Health and that all Russian citizens who worked abroad with international organisations were given diplomatic passports, not just those who were seconded from the Russian civil service. He had worked at the Russian Academy of Sciences, which is independent from the Russian Ministry of Health. The Academy never guaranteed the restoration of his former position, which the principle of secondment requires, and in 1997 it advised him that he would not be able to resume it.

E. In its surrejoinder the Organization denies that the complainant was simply advised of the agreement between the WHO and the Russian Ministry; he gave his concurrence in 1993 and again in 1995 by signing the following clause: "I have been informed and accept the conditions governing extension of my contract referred to above". This concluded the agreement.

In a statement filed with the headquarters Board of Appeal in 1997, the complainant himself declared that the Russian Ministry of Health and the Academy of Sciences were, at that time, two separate institutions; this was not the case at the time the Ministry of Health issued its undertaking that he would have the right to revert to his former employment. The Russian Ministry of Health has since offered the complainant the position of Senior Lecturer at the Russian Medical Academy of Postgraduate Education of the Ministry, and is awaiting his return.

The Organization observes that, in his rejoinder, the complainant argues again that he was never a member of the Russian civil service. Yet he never raised this issue while serving at the WHO or in his submissions to the Board of Appeal. The Organization maintains that this late allegation cannot be sustained because, although he may not have been in possession of a diplomatic passport at the time of his separation from service, he did hold one before.

CONSIDERATIONS

1. The complainant challenges the decision of his employer, the World Health Organization (WHO), not to extend his appointment beyond 31 December 1997, the date of the expiry of his fixed-term contract. The only substantive issue between the parties is whether or not the complainant was on secondment from his national government at the time of the expiry of his fixed-term contract and, if so, whether the Organization could properly refuse to renew his contract.

2. At the time of his initial appointment on 1 July 1989, there was no clear, documented agreement between the Organization, the Government of the then USSR and the complainant establishing that the

latter was indeed on secondment. In April 1993, just prior to the expiry of the complainant's fixed-term appointment, the Organization wrote to ask him if he wished to be considered as being on secondment. The complainant replied by signing a copy of the Organization's letter indicating that he did wish to be so considered; he also asked a question about the effects of being on secondment which, at least as far as the documents show, does not appear to have been answered. The Organization then sought and obtained the concurrence of the Ministry of Health of the Russian Federation to the secondment of the complainant for a further period of two years. When the concurrence of the Ministry had been obtained the Organization sought the complainant's agreement to the extension of his appointment on secondment. On 15 September 1993 the complainant confirmed unequivocally his acceptance of the extension of his contract as an employee on secondment. A further extension to 31 December 1997 was later granted with the written concurrence of the complainant's national government and the complainant.

3. In June 1997 the Ministry of Health of the Russian Federation informed the Organization of its decision not to extend the complainant's secondment beyond the date on which it was due to expire, namely 31 December 1997. When the Organization confirmed that it would not renew the complainant's appointment beyond its expiry date, the complainant appealed to the headquarters Board of Appeal which recommended that his appeal be allowed on the basis that there was no "written formal tripartite agreement" covering the complainant's secondment. The Board seems to have been of the view that such agreement was required by the Tribunal's Judgment 1249 (*in re* Reznikov). By letter dated 26 June 1998, the Director-General refused to accept the Board's recommendation. He asserted that the complainant was on secondment from the Government of the Russian Federation and that the latter had not agreed to an extension of the complainant's appointment beyond 31 December 1997. The Russian Government had, however, confirmed that his rights and entitlements as an employee of that Government would be maintained. The Director-General accordingly confirmed the decision not to extend the complainant's employment. That is the impugned decision.

4. Many of the complainant's arguments do not merit prolonged consideration; there is no evidence to show that his consent to secondment was not voluntary and his civil service in Russia cannot be seriously contested. The complainant's only substantive argument is based upon his reading of the Tribunal's decision *in re* Reznikov which, he argues, establishes that a formal single document signed by all three parties is required to establish a secondment. He also argues that his signature to various memoranda in which he appears to have accepted secondment indicates only that he wished to be considered for secondment and not that he agreed to it. He also says that a true secondment requires that the seconded staff member be entitled to return to his former position with his national government when the secondment comes to an end.

5. The arguments are untenable. The requirement that a secondment be properly documented and consented to by all parties, which flows from the *in re* Reznikov judgment, does not require that all three parties put their signature to a single piece of paper. What happened in the present case was quite enough to establish such an agreement. The correspondence described above (at 2) shows that the agreement is "formal" in the sense that it is fully documented; it is also "tripartite" in the sense that there is a clear meeting of the minds of the three parties concerned. Nothing more is required. The Board of Appeal's reading of the *in re* Reznikov decision as requiring a "written formal tripartite agreement" finds no warrant in the actual wording of that decision. Secondly, the documents simply do not bear the construction which the complainant seeks to put upon them. While his signature on the memorandum of 20 April 1993 from the Administration may be seen as equivocal (it is not necessary to decide on that point), his subsequent endorsements of the documents submitted to him cannot be read as anything but a clear acceptance of his status as a seconded employee.

6. Finally, the evidence is to the effect that the Government of the Russian Federation has undertaken to respect the complainant's rights as an employee. This is all that the Organization can be required to secure for him. It is not, as the complainant seems to think, obliged to guarantee that he will be entitled to return to the identical post that he occupied at the time when he left.

7. What is required of the seconding government is that it undertake to provide the seconded employee upon his return with all the employment rights he would have had if he had continued in the employment of the government. There is no indication whatever that the Government of the Russian Federation will not fulfil its obligation in this regard.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Cervantes (No. 3), De Lucia, Luckett and Munnix**

Judgment 1896

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Jean-Pierre Cervantes, as well as those lodged by Mr Gennaro De Lucia, Mr Paul Luckett and Mr Serge Munnix against the European Patent Organisation (EPO) on 14 December 1998, the EPO's single reply of 8 March 1999, the complainants' rejoinder of 1 April and the Organisation's surrejoinder of 11 June 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. According to Article 37(c) of the Service Regulations for Permanent Employees of the European Patent Office, secretariat of the EPO, the staff shall be represented on the Appeals Committees.

Article 110 of the Service Regulations reads:

> "(1) The Appeals Committee shall consist of a Chairman and four full members.
>
> ...
>
> (3) In respect of appeals against decisions of the Administrative Council, the Chairman and full members of the Committee shall be appointed by the Administrative Council each year.

> (4) In respect of appeals against decisions of the President of the Office, the President shall each year after consulting the General Advisory Committee, appoint a Chairman and two full members of the Committee. The Staff Committee shall at the same time appoint two full members of the Committee. Two deputy Chairmen and four alternate members shall also be appointed under the same conditions and shall take part in the proceedings of the Committee if the Chairman or full members are not able to act."

The complainants are all permanent employees of the EPO. At the time the decision was challenged, they were members of the Central Staff Committee and the General Advisory Committee.

The first Appeals Committee against decisions of the Administrative Council, hereinafter the Council's Appeals Committee, was not set up until 1996. There were no staff members represented on this Committee. At the Council's 63rd session in October 1996, the members of the Central Staff Committee expressed the wish to be represented on the Council's Appeals Committee. By a note to the Council on 27 November 1996, they reiterated their request which was rejected by the Council at its 65th session in December 1996.

By letters of 27 February 1997, the complainants lodged appeals with the Administrative Council Chairman to obtain staff representation on the Council's Appeals Committee. By a letter of 4 April 1997, the Council Chairman informed them that he had forwarded their appeals to the Council's Appeals Committee. It delivered its opinion on 2 September 1998 and recommended that the appeals be rejected. By a letter of 23 October 1998, the impugned decision, the Administrative Council Chairman advised the complainants that the Council had, at its 72nd session, decided to reject their appeals.

B. The complainants plead breach of Article 37(c) of the Service Regulations, recognizing the right of the staff to be represented on the appeals committee*s* [emphasis added]. The Service Regulations only mention two appeals committees, that of the Council and that of the President of the Office, provided for in paragraphs 3 and 4, respectively, of Article 110.

In contrast to paragraph 4 of Article 110, paragraph 3 does not specify the composition of the Council's Appeals Committee. However, paragraph 3 should not be considered contradictory to the general principle contained in Article 37(c) because to exclude all staff representation from the relevant Appeals Committee would go against the principle whereby exceptions made to a general principle by a specific provision should be strictly interpreted.

Depriving staff members appointed by a Council decision of the right to be represented on the Council's Appeals Committee, basically responsible for reviewing disputes relating to staff, would amount to unequal treatment of employees.

The two appeals committees discussed in Article 110 of the Service Regulations must deal with individual decisions whose only difference lies in the category of the employees concerned. There is, therefore, no reason for different rules to be applied.

The complainants deduce from the case law that the intent to preserve the independence of the Council's Appeals Committee does not warrant the exclusion of staff representatives. Further, they contend that the current Committee is "unbalanced" because it chiefly comprises former Council members and the staff is not represented.

The complainants ask the Tribunal to quash the decision of 23 October 1998 and to award them moral damages of 1,000 German marks for each month the Council refuses to accept staff representation on the Council's Appeals Committee and 5,000 marks in costs.

C. The Organisation quotes Article 34(1) of the Service Regulations in its reply: "The Staff Committee ... shall maintain suitable contacts between the competent administrative authorities and the staff". Article 33 of the European Patent Convention states that the Administrative Council is the legislative body of the EPO. The Organisation deduces that the Staff Committee does not participate directly in the Council's decision-making process. It is, therefore, excluded from the Council's Appeals Committee which does take an active part in the Council's decision-making process.

Article 110(3) of the Service Regulations is a *lex specialis* which takes precedence over the *lex generalis,* Article 37(c). If the drafters of the Service Regulations had intended that the staff be represented on the committee concerned, they would have clearly specified it as they did for the President's Appeals Committee. The Organisation, therefore, strictly interpreted Article 110(3) of the Service Regulations. As to the use of the plural in Article 37(c), it can be explained by the fact that the EPO could have set up several committees, since the staff was assigned to four different duty stations.

The decision of 23 October 1998 does not affect the rights of "senior employees", i.e. appointed by Council decision, in keeping with the rule that similar acts require similar procedures: staff representatives not involved in the decision-making process within the Council cannot take part in reviewing these decisions. Nevertheless, the staff is not necessarily excluded from the review process of an appeal put to the Council's Appeals Committee: Article 113(3) of the Service Regulations states that the appellant can be assisted by the person of his choice, possibly a staff representative.

D. In their rejoinder the complainants point out that the appeals committees do not participate directly in the decision-making process because they only give an advisory opinion. Moreover, the Council has sometimes applied to its appeals committee provisions of Article 110(4) by appointing, for example, a deputy chairman and alternate members.

The absence of senior staff representatives on the Council's Appeals Committee "is compensated only very inadequately by the right to be assisted when being brought before this Committee".

E. The EPO submits in its surrejoinder that the opinions of the Council's Appeals Committee have a "direct impact" on the Council's decisions; this is why the complainants wish to be represented.

The two appeals committees are responsible for reviewing decisions delivered by two bodies, the President of the Office and the Administrative Council, the "specific level and nature" of which justify the different composition of the aforementioned committees.

To ensure that its Appeals Committee ran smoothly, the Administrative Council had to appoint a deputy chairman and alternate members.

Most of the decisions regarding senior employees are made by the President of the Office and any complaints are lodged with the President's Appeals Committee.

CONSIDERATIONS

1. At the EPO Administrative Council's 63rd session, the complainants, in their capacity as staff representatives and basing their plea on Article 37(c) of the Service Regulations, asked that the staff be represented on the Council's Appeals Committee. Though provided for in the Service Regulations, this Committee had been set up for the first time in March 1996, since the need had not been felt before. Shortly before the 65th session, the Central Staff Committee submitted a formal request for staff representation on that Committee.

The Council rejected this request. The complainants, permanent employees sitting on the Central Staff Committee and the General Advisory Committee, each lodged an internal appeal which was rejected by the Council based on the recommendation of the Council's Appeals Committee. That is the impugned decision.

The complainants seek the quashing of the decision as well as an award of 1,000 German marks in moral damages "for each month the Council fails to grant them representation on its Appeals Committee" and 5,000 marks in costs.

The Organisation asks the Tribunal to dismiss the complaint.

2. The complainants cite Article 37(c) of the Service Regulations calling for staff representation on "appeals committees". The plural, they claim, refers to the President's Appeals Committee and the Council's Appeals Committee.

The Organisation sees in Article 37(c) a case of legislative inadvertence. The use of the plural can be explained by the fact that President's Appeals Committees could have been set up in each of the

Organisation's duty stations. Not allowing staff membership on the Council's Appeals Committee results, on the contrary, from Article 110 of the Service Regulations, paragraphs 3 and 4. In paragraph 3, the Council appoints the members of the Appeals Committee, with no mention of staff representatives; paragraph 4, however, clearly describes how the staff can be represented on the President's Appeals Committee. It would also be a breach of the EPO's rules if decisions - often of a "legislative" nature - taken by the executive body representing member States could be challenged before an internal body on which the staff is represented.

These arguments are refuted by the complainants.

Receivability

3(a) Staff representatives in the Organisation's bodies can, in addition to their own interests, defend before the Tribunal those interests of the employees they have been appointed to represent, at least when that right is recognized by the Organisation's rules (see Judgments 1618, *in re* Baillet No. 2 and others, under 6, and 1147 *in re* Raths, under 4). These conditions are met in the present case and the complainants are empowered to carry out this dual function.

(b) Decisions of a general thrust relating to the attributions of power can be challenged forthwith, without having to wait until the body, whose composition is contested, delivers an unfavourable individual decision to the appellant (see aforementioned Judgment 1618, under 4 and 5).

Such is the case of the decision relating to the composition of the Council's Appeals Committee.

Merits

4. According to Article 1(4) the Service Regulations apply to members of the Boards of Appeal and to the Enlarged Board of Appeal (appointed by the Administrative Council, according to Article 11 of the

European Patent Convention) to the extent that their independence is not affected. These provisions, however, apply to the President and Vice-Presidents of the Office only to the extent that their employment agreement expressly stipulates it (see Article 1(5)).

Articles 2 and 37 of the Service Regulations read:

"Article 2

Bodies under the Service Regulations

There shall be set up within the Office:

a) a Staff Committee,
b) joint committees,
c) Promotion Boards,
d) Disciplinary Committees,
e) Appeals Committees,
f) Selection Boards,
g) an Invalidity Committee,

which shall perform the functions assigned to them under the Service Regulations."

"Article 37

Other Bodies

The staff shall be represented on the following bodies:

a) the joint committees,
b) the Disciplinary Committees,
c) the Appeals Committees,
d) the Promotion Boards and
e) the Selection Boards."

(a) The joint committees consist of a General Advisory Committee and Local Advisory Committees (see Article 38(1)). The Chairman is appointed by the President of the Office, whereas the other members are appointed in equal numbers by the President of the Office and the Staff Committee (see Article 38(2)).

(b) There are two disciplinary committees for employees according to whether the appointing authority is the President (see Article 98(1) and (2)) or the Administrative Council (see Article 98(3)). In the first instance, joint lists to be used for drawing lots will be established in each case to designate the members to be called upon to serve on the committee (see Article 98(1) and (2)). In the second instance, the Service Regulations state that "the Administrative Council shall appoint the Disciplinary Committee", without stipulating whether this special rule is incompatible only with regard to the appointing authority or also with regard to the joint composition of the committee (the latter appears to be the case, subject to the provisions of Article 37(b)).

(c) Title VIII of the Service Regulations concerns "appeals" in Articles 106 to 113. A distinction is drawn between those decisions taken by the President of the Office and those taken by the Administrative Council (see Article 106(2)). The Service Regulations, of which Article 110 relating to the composition of the Appeals Committee is quoted under A above, does not provide for other appeals committees; neither does it allude to the possibility of setting up local appeals committees. Separate rules govern the activities of both committees.

(d) Article 49 of the Service Regulations, which concerns promotion, refers to the Promotion Board. "Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board" (Article 49(4)). The composition of the Board apparently varies according to the promotions envisaged, since it is composed jointly of "a Chairman and four members belonging to a grade equal to or higher than the grade to be assigned" (Article 49(5)).

(e) Rules governing competitions are included in Annex II of the Service Regulations. The bottom line is that the appointing authority draws up a list of candidates fulfilling the conditions laid down and sends it to the Chairman of the Selection Board (see Article 4). According to Article 7(1) of the Service Regulations, the rules governing recruitment and the selection board also apply in principle to senior employees appointed by the Council, in application of Article 11 of the European Patent Convention. However, the appointing authority can also adopt another recruitment procedure. An ad hoc selection board is designated for each competition (see Article 7(2) of the Service Regulations).

5. The issue of staff representation on the Council's Appeals Committee is settled in Article 37(c) of the Service Regulations –

according to the complainants – and in Article 110 of the Service Regulations – according to the Organisation.

These provisions are apparently contradictory. Indeed, Article 37(c) sets forth the principle of representation on the appeals committees, which necessarily includes the two appeals committees provided for in the Service Regulations, i.e. also the Council's Appeals Committee. In contrast, Article 110 of the Service Regulations governing the composition of the two appeals committees expressly stipulates the manner in which the staff is represented on the President's Appeals Committee, whereas for the other committee it states only that it is appointed by the Council, without any reference to staff representation. This could lead one to believe that such representation is not provided for in this body.

The Service Regulations should be interpreted according to the general legal principles relating to the interpretation of laws.

(a) If interpreted literally, staff representation can be admitted. Indeed, Article 37(c) of the Service Regulations is applicable to the two appeals committees provided for in the Service Regulations. Article 110 is not incompatible with the conditions set forth in Article 37(c). As these are rules governing only two committees, it would be meaningless to draft a "general rule" which would only be applied to one of these committees. Indeed, if that were the lawmaker's intention, he could and should have expressed it in Article 37 of the Service Regulations.

(b) An interpretation *contra legem* would imply that the lawmaker had not expressed himself correctly and had given another meaning to the rule than the one he intended. That cannot be presumed.

The Organisation provides no proof that the authorities may have envisaged, during the work preceding the adoption of the rule, the exclusion of staff representatives from the Council's Appeals Committee.

Nor has the rule been applied over an extensive period of time, which would help define its scope, the Council's Appeals Committee not being set up until the spring of 1996.

(c) A careful review of the Service Regulations reveals that the Organisation's interpretation does not stand either.

In contrast with Article 2 of the Service Regulations listing the bodies whose composition and tasks are described in it, Article 37 does not appear to be a mere outline or list without its own scope. It does indeed have a legislative content, that is to say, the representation of employees in the various bodies mentioned.

If one then compares the use of the plural in Article 37(c) with the one used for the other bodies, these bodies do have two or several committees, which can be accepted in particular for ad hoc committees. Likewise, Article 37(c) can be understood to cover both appeals committees.

In comparison with Article 37(c), Article 110 no doubt raises questions since it specifies the manner in which the President's Appeals Committee should be composed, i.e. jointly. As for the other committee, the only indication is that its members are appointed by the Council. This problem – a real one – does not allow one to conclude that Article 37(c) should not be applied in the latter case. The two rules are not, however, totally incompatible, even if a gap must be filled to reconcile the two.

The Organisation points out that it would go against its rules if it were possible to submit the Council's decisions to an appeals committee comprising staff representatives: the Council is the supreme power composed of delegates of member States and many Council decisions are supposedly of a legislative nature. This line of reasoning is not wholly convincing. The Council's decisions and legislative acts can be challenged by employees according to the conditions fixed by the Organisation's rules and the Statute of the Tribunal. Further, one of the President's duties is to enact legislative acts in addition to the individual decisions he takes.

Lastly, disputes relating to staff members appointed by the Council come mainly under the Council's jurisdiction. According to Article 1(4) of the Service Regulations, these employees, in principle, have the same rights and obligations as other staff. They can thus hope that their disputes may, if necessary, be presented before an appeals committee on which the staff is represented, which is the case for other employees. With regard to equality between the two staff categories, the Tribunal ruled that there was no reason why an employee appointed by the Council could not sit on a promotion board as a staff representative in matters regarding decisions taken by the President of the Office (see aforementioned Judgment 1147 under 5). Finally, staff representation on the Council's Appeals Committee does not undermine the Council's authority since the Committee's role is purely advisory and decisions on appeals belong, in any event, to the Council. Staff representation on the committee allows the staff to voice its opinion on matters arising in a particular case.

(d) For similar reasons, one could not hold that the aim of the rule requires that the Organisation's interpretation be respected. This aim stems from the method chosen by the lawmaker. The advantages of having staff representatives on the relevant appeals committee to examine the appeals filed against the President's decisions are consistent with those of having employee representation on the relevant appeals committee to deal with the appeals lodged against the Council's decisions.

For all practical purposes, no method of interpretation allows one to conclude that the rule in Article 37(c) of the Service Regulations - applied to the Council's Appeals Committee - is flawed. The written law must, therefore, be applied, in particular by the authority having enacted it, as long as it has not been repealed or modified for the sake of the principle that similar acts require similar rules.

The complaint must, therefore, be allowed. Since the Service Regulations do not state how staff representation must be ensured, it is up to the Organisation to find a solution. It would be hasty to rule on this point since the complainants claim they are willing to consult with the Organisation.

The conditions for awarding moral damages have not been met. The complainants' claims relating to this point must be disallowed. At this stage, the order to pay a penalty would be, at the very least, premature.

DECISION

For the above reasons,

1. The challenged decision is set aside and the case sent back to the Organisation for ruling by the Administrative Council as set forth in 5(d).

2. The Organisation shall pay the complainants the global sum of 2,000 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Cervantes (No. 4),
Kagermeier (No. 5) and
Munnix (No. 2)**

Judgment 1897

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Jean-Pierre Cervantes, the fifth complaint filed by Mrs Ingrid Kagermeier and the second complaint filed by Mr Serge Munnix against the European Patent Organisation (EPO) on 14 December 1998, the EPO's single reply of 8 March 1999, the complainants' rejoinder of 1 April and the Organisation's surrejoinder of 11 June 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Paragraph 1 of Article 54 of the Service Regulations of the European Patent Office, the secretariat of the EPO, provides in part that:

> "A permanent employee shall be retired
>
> - automatically, on the last day of the month during which he reaches the age of sixty-five years;
>
> ..."

The complainants are all officials of the EPO. At the date of the impugned decision, they were members of the Central Staff Committee and the General Advisory Committee.

In a letter to the Administrative Council, dated 5 December 1996, the President of the Office recalled that the age limit of sixty-five years for retirement of employees applied to members of the boards of appeal. He nevertheless proposed to the Council, "on an entirely exceptional basis and for social reasons", to retain in their functions two members of the boards of appeal beyond that age limit on the grounds that, at the retirement age, they would not have completed the minimum of ten years of service required by Article 7 of the Pension Scheme Regulations for entitlement to a retirement pension. At its 65th meeting, held in December 1996, the Council approved this proposal and authorised its Chairman to conclude contracts with the two staff members concerned. This decision also granted them access, after their retirement, to the EPO's health insurance scheme.

By letters of 27 February 1997, the complainants appealed to the Chairman of the Council with a view to having this decision set aside. In a letter dated 4 April 1997, the Chairman informed them that he had transmitted the above appeals to the Council's Appeals Committee. The Committee issued its opinion on 2 September 1998 and recommended that the appeals should be upheld. By a letter of 23 October 1998, which is the impugned decision, the Chairman of the Council informed the complainants that, at its 72nd meeting, the Council had decided to reject their appeals.

B. The complainants argue that the impugned decision is unlawful on several counts. It was taken in violation of Article 54 of the Service Regulations and the Council was not empowered to grant rights which did not correspond to any applicable general conditions of service. The decision is also in breach of the principle of equality of treatment, since the situation of the two persons covered by the impugned decision does not warrant any difference of treatment. Under the Pension Scheme Regulations, a person who has not completed the required period of service may only be granted a pension in cases which the complainants qualify as "force majeure", such as invalidity. Finally, in accordance with Article 38(3) of the Service Regulations, the Administrative Council should have consulted the General Advisory Committee since the impugned decision, in view of its consequences on the pension and health insurance schemes, concerns the whole of the staff.

By giving the two staff members concerned the possibility to benefit from a retirement pension and the health insurance scheme, even though they could certainly have re-entered national schemes, the Administrative Council prejudiced the interests of the complainants. They say that, if the contribution rates for the two schemes have been reasonable up to now, this is because the great majority of staff members exceed by far the minimum threshold of ten years of contributions. If the Council authorises an artificial rise in the number of staff members just managing to reach this threshold, the whole of the staff will have to bear the cost of a "specific benefit" which is only granted to certain of them. Indeed, the next actuarial study will have to take into account these extraordinary benefits, since contribution rates are reckoned on the basis of all the benefits provided. The additional cost is "far from being negligible" for the two schemes. Even if it is insignificant at the individual level, that does not make the Council's decision lawful. Furthermore, this decision constitutes "a dangerous precedent", since a rise in the number of exceptions, particularly for the contracts of Vice-Presidents, could have a more significant impact on the level of contributions.

The complainants request the Tribunal to set aside the decision of 23 October 1998 or, subsidiarily, they request it to order that the additional cost to the EPO's pension and health insurance schemes caused by this decision be borne wholly by the Organisation's budget, and not co-financed by the contributions of staff members; to grant them 1,000 German marks in moral damages for each month that the Council persists in refusing to revoke its decision, as well as 5,000 marks in costs.

C. In its reply the EPO challenges the receivability of the complaint on several counts. It argues that the impugned decision does not have immediate legal consequences. Only the conclusion of contracts with the two members of the boards of appeal could prejudice the interests of the complainants. Their rights as staff representatives have not been injured, since Article 38(3) of the Service Regulations did not apply in the present case. Moreover, the complainants do not show any real and present cause of action. The impugned decision, which is an exceptional measure, cannot have a "significant" financial impact as it only concerns two staff members out of four thousand and the complainants do not demonstrate any real prejudice.

In subsidiary argument the EPO explains that the beneficiaries of the contracts in question ceased to be employees of the Office on the last day of the month during which they reached the age of sixty-five years, and as of that moment their situation was then subject to the contracts proposed to them. There was, therefore, no breach of Article 54 of the Service Regulations. It says that the Administrative Council is competent to settle all matters relating to the terms and conditions of employment of staff members whether or not they are permanent employees and that, furthermore, the EPO was only fulfilling its duty of care towards its staff members. The principle of equality of treatment has not been breached, since the complainants are not in the same situation of fact and of law as the beneficiaries of the contracts in question.

The EPO says that it did not grant "favourable treatment" to the two staff members, as they had to continue to pay their contributions. The position of the complainants challenges the principle of solidarity on which the pension and health insurance schemes are based. The EPO excluded from the contracts in question the element which could have had a negative impact on contributions, namely entitlement to survivor's and invalidity benefits. The impact on the next actuarial evaluation will be minimal, since one of the two beneficiaries of the contracts left work on 1 October 1997 and only one person is still covered by the impugned decision.

It asserts that, if it had been possible to envisage the reintegration of the two persons concerned into their national insurance schemes, this solution would have been adopted.

The EPO adds that there was no adversarial discussion in the Council's Appeals Committee because only the complainants were heard.

It contends that the criticisms of the contracts of Vice-Presidents are not within the ambit of the present complaint.

D. In their rejoinder the complainants submit that the EPO did not contest the receivability of the internal appeals *ratione temporis*. Moreover, it was not possible for them to ascertain the date on which the contracts were concluded with the members of the boards of appeal. The reality and extent of the prejudice caused have to be decided on the merits, and are not issues of receivability.

They argue that the Pension Scheme Regulations are not applicable to contract staff. Furthermore, only periods of service as permanent employees of the EPO are taken into account to determine entitlement to pensions, as well as, where appropriate, periods of service in other capacities completed before permanent appointment.

They add that the EPO's reference to its duty of care is not pertinent. By gaining access to the EPO's pension scheme, the beneficiaries of the contracts in question benefit from coverage which is clearly more favourable to them than that of the immense majority of other staff members. For example, for their health insurance, they will benefit from comprehensive coverage in return for very low contributions.

The complainants contend that it is for the EPO to reckon the actuarial deficit, as they do not have the means to do so.

The EPO could have been heard by the Council's Appeals Committee had it so requested. The complainants say that they only learnt from the EPO's reply to their complaint that one of the beneficiaries of the contracts had resigned.

E. In its surrejoinder the EPO presses its arguments and refutes the explanations made by the complainants in their rejoinder.

CONSIDERATIONS

1. Permanent employees of the EPO are automatically retired on the last day of the month during which they reach the age of sixty-five years. They are not entitled to a retirement pension until they have completed at least ten years of actual service with the EPO.

The EPO recruited two staff members when they had already passed the age of fifty-five. At the time the present complaint was lodged, these two employees were members of boards of appeal.

When they were drawing near to the age of sixty-five, the President of the Office requested the Administrative Council to authorise their engagement under contract beyond the age of sixty-five years as an exceptional measure to enable them to complete the ten years of service required for entitlement to a retirement pension.

At its 65th meeting, the Administrative Council, while confirming that the age limit also applied to members of the boards of appeal, authorised the exception and the conclusion of contracts with these staff members. These contracts were to be signed by the Chairman of the Council, who is the person empowered to appoint the members of the boards of appeal.

The complainants, who are staff representatives, lodged internal appeals with the Chairman of the Council against this decision, arguing that it was unlawful, that it breached the principle of equality of treatment and that it prejudiced other staff members participating in the pension scheme by proportionally increasing the cost to them of the pension and health insurance schemes, which is shared according to the principle of solidarity, without taking the risk into account. In their opinion, the General Advisory Committee should have been consulted in view of the importance of the principle involved.

The internal appeals were transmitted to the Council's Appeals Committee, which recommended that they should be upheld for the reasons given by the complainants.

Nevertheless, the Council decided to dismiss the appeals on the grounds which are examined below.

This is the decision which is being impugned. As their principal plea, the complainants seek the quashing of the Council's decision and the decisions to engage the two persons concerned. Subsidiarily, they request the Tribunal to order that the additional cost to the EPO pension and health insurance schemes caused by the decision be wholly borne by the budget of the Organisation and not co-financed through the contributions of staff members. They also request compensation of 1,000 German marks in moral damages "per month that the Council persists in refusing to rescind its decision" and 5,000 marks in costs.

The EPO requests that the complaint be rejected.

2. The EPO argues that the complainants did not challenge the individual decisions to conclude contracts with the two members of the boards of appeal.

But it is mistaken in qualifying the Council's decision as being of a general nature. The complainants have not formally challenged the contracts concluded with the two persons concerned, but only the authorisation to conclude such contracts. However, the meaning of their challenge was clear and has not escaped the Organisation. The Council took individual decisions concerning these persons, subject to their acceptance.

While the appeals might seem to have been premature, they were, however, perfectly valid once the offers had been accepted. As the Organisation did not contest the receivability of a premature appeal on this score during the internal procedure, the principle of good faith prevents it from doing so subsequently (see, for example, Judgment 1393, *in re* Cook No. 2, under 9).

This argument therefore fails.

3. On 1 October 1997, one of the two persons concerned gave up work earlier than foreseen, for health reasons. He received a severance grant and the reimbursement of the amounts deducted for his pension. He thereby lost all the benefits envisaged in the disputed contract. He will not therefore benefit from a retirement pension, nor from a preferential rate as a retired staff member for his coverage by the health insurance scheme.

It is not claimed that he enjoyed any undue benefit by reason of his coverage by the health insurance scheme during the course of his extended service.

In this regard, the internal appeal lost any cause of action on 1 October 1997; the complaint before the Tribunal also shows no cause of action.

4. As for the other person concerned, the period envisaged for the extension of the appointment, 10 April 1998, has elapsed. This circumstance does not necessarily prevent the impugned acts from being set aside with retroactive effect. Allowing the complaint is not, therefore, devoid of all practical interest. On this score, the complaint is not irreceivable. If the reasons invoked are well-founded, it would be an issue of substance as to whether the setting aside of the decision would be an adequate sanction (see 12 and 13 below).

5. In their capacity as the official representatives of the staff, the staff representatives on EPO bodies are able to act not only in their own interests, but also in the interests of the staff, at least when so permitted by the internal rules (see Judgments 1147, *in re* Raths, under 4, and 1618, *in re* Baillet No. 2 and others, under 6).

These conditions are fulfilled in the present case and the complainants may act in this double capacity.

6. The two persons concerned have not been invited to give their views concerning the complaint which seeks to set aside the decisions from which they benefited. A general principle of law has it that the legal situation of someone cannot be modified before they have had an opportunity to be heard. This principle is also valid for international organisations and the Tribunal, particularly where a staff member challenges a decision determining the legal status of a third party.

In the present case, it is not necessary to seek the views of the third parties concerned, as allowing the complaint cannot affect their legal situation. Indeed, the complaint has lost any cause of action insofar as it relates to the person referred to under 3 above. Moreover, setting aside the authorisation made by the Council could not end the contractual relations between the Office and the other person concerned, since the contract has already expired and his good faith must be protected (see 12 below).

7. The EPO argues that the impugned decision will not prejudice the interests of the complainants, who refute this argument.

In short, the complainants contend that the impugned decision is unlawful and that it will have the effect of allowing a form of unequal treatment.

The right to equal treatment is breached when, in like or comparable situations, one person enjoys a benefit which is not granted to another. The impugned decision allowed two staff members reaching the age of sixty-five years, the age of automatic retirement, to obtain an extension of their service beyond that age so that they could complete a total period of service of ten years, thereby allowing them to obtain a retirement pension and to maintain their coverage by the health insurance scheme under favourable conditions. None of the complainants claims to be in the situation of reaching sixty-five years without being able to complete a period of ten years of service with the EPO. They cannot, therefore, personally complain of inequality of treatment on that score. However, they could argue inequality of treatment with regard to the financial impact of the measure, and its basis in law.

They can, nevertheless, challenge the lawfulness of a measure which is prejudicial to them. In this respect, their argument is admissible that, in principle, in view of the system of sharing the costs of the retirement and health insurance schemes, the contributors as a whole may have to pay more than if the two beneficiaries had not been granted the disputed extension, which they say is unlawful. The complainants do indeed contend that the challenged decision would give rise to such additional cost and the EPO does not exclude the possibility of this additional cost, although it asserts that it would in any case be minimal and have an almost insignificant impact on the amount paid by each contributor. But this does not authorise the EPO to adopt an unlawful measure or prevent the staff members from challenging it.

The lawfulness of the proceedings

8. The EPO complains that it did not have the right to be heard by the Appeals Committee, which allowed the complainants to speak without the presence of the Administration and without granting it the same opportunity. It says that this was in breach of the principle of adversarial debate.

However, it rightly does not press this argument, since it cannot appeal against its own decisions.

In any case it was not injured, since in the impugned decision the Council did not follow the recommendation of the Appeals Committee and gave the reasons for its decision.

9. The complainants take the EPO to task for not submitting to the General Advisory Committee the question of principle raised in this case, namely the possibility of granting an extension beyond the age of sixty-five by means of a contract.

The EPO retorts that such consultations were not necessary in view of the exceptional nature of the measure, which it did not intend to repeat in other cases. It did not, therefore, raise an important question of principle for the future.

Article 38(3) of the Service Regulations provides that:

> "The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:
>
> - any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions ..."

In the present case, the proposed measure did not consist of the adoption or amendment of rules concerning the whole of the staff. Furthermore, the impugned measure concerned two individual decisions presented as being exceptional and non-renewable. In view of their minor impact on the situation of staff members and their exceptional nature, the EPO did not abuse its latitude by refraining from consulting the General Advisory Committee.

The merits

10. The text of Article 54 of the Service Regulations clearly provides that "a permanent employee shall be retired … automatically, on the last day of the month during which he reaches the age of sixty-five years …" Nor is it contested that entitlement to a retirement pension is only obtained after a period of ten years service with the Organisation (see Article 7 of the Pension Scheme Regulations).

It is furthermore not contested that, if the rules are applied strictly, the two members of the boards of appeal would not have been entitled to a pension in their capacity as staff members reaching the age of sixty-five without having completed a period of ten years of service.

Nevertheless, the EPO believed that it could authorise the two persons concerned, by permitting an exception to the rules, to continue working beyond the age of sixty-five years in order to complete ten years of service. The complainants challenge the lawfulness of this exception.

The issue raised does not relate to discretionary authority, but solely concerns the lawfulness of the impugned decision, a question which the Tribunal can freely examine.

In accordance with the principle that administrations in their action must abide by the rules of law, the EPO is bound to respect the rules which govern it (the *patere legem* principle). An exception to a general rule is, therefore, possible only when it is provided for by the rules in force.

The possibility of granting an exception may also be derived from the interpretation of a written text. Moreover, rules may have shortcomings which need to be remedied during their implementation, for example when a new situation emerges which the "legislator" did not intend to cover and which requires an appropriate solution (see, for example, Judgments 1679, *in re* Serlooten and 1877, *in re* Serlooten No. 2, under 4(a)).

The EPO does not invoke any explicit rule permitting exceptions in specific cases from retirement at the age envisaged in the Service Regulations. In this respect, this case differs from the others examined by the Tribunal (see Judgments 204, *in re* Silow No. 4, 223, *in re* Gausi, 267, *in re* De, under 1, 358, *in re* Landi, under 9, 1143, *in re* Jones, under 3, and 1816, *in re* Gutiérrez No. 2, under 5).

The only reason given for granting the exception is the consideration that it would be inequitable to deprive the staff members of a retirement pension on the grounds that, having been appointed after the age of fifty-five, they could not fulfil the requirement of ten years service.

Nor is any evidence produced to show that there are any real shortcomings in the rules. The rules appear to have contemplated a situation such as that of the two persons concerned, which was not of an exceptional nature and which was not unforeseeable by the legislator. It was also clear at the time of their recruitment that, when they reached retirement age, they would not fulfil the conditions for entitlement to a retirement pension.

The EPO's observation that in future no further exceptions of this nature would be granted also shows that it was not faced with a new situation which had not been envisaged by the legislator or requiring a remedy for a shortcoming in the form of a new rule of general application.

If the rule is not satisfactory, it is for its author to change it.

11. The EPO puts forward other arguments which, in its view, show that there was no breach of Article 54 of the Service Regulations.

(a) In the first place, it argues that the legal basis for the decision lies in the fact that the Council is also the legislator, or the body which is competent to adopt or amend the Service Regulations (see Article 33 of the European Patent Convention). It says that it can, therefore, allow exceptions to its own rules.

This argument cannot stand. A general principle has it that an authority is bound to respect the rules which it has itself set.

Furthermore, in keeping with the rule that similar acts require similar procedures, the modification of a rule – including allowing an exception – must respect the same process which was used for its adoption.

It therefore follows that, in the context of a decision respecting their application, the Council could not amend the rules governing the age of retirement and the conditions of entitlement to a retirement pension without following the procedure used for the adoption of such rules. It did not do so in the present case.

(b) The EPO also contends that, having reached the age of sixty-five years, the two persons concerned ceased to be employees. However, they could be engaged as contract staff and a teleological interpretation of Article 33(2)(b) of the Convention would have it that "the Council is competent to regulate all the issues relating to the conditions of service of its staff, whether or not they are permanent employees". On these grounds, it argues that the Council was competent to convert the status of the two persons concerned from staff members to contract staff under conditions which constitute exceptions to the Service Regulations, in terms of the duration of service and the conditions for entitlement to a retirement pension.

This argument cannot stand. One of the purposes of Article 33 of the Convention is to allow the Council to issue general rules relating to the conditions of service applicable to all staff members. Under Article 33 the Council is not authorised to evade the rules set out in the Convention, in the absence of a provision authorising exceptions, by means of individual decisions which are contrary to the letter and purpose of the Service Regulations.

It is not necessary to examine the rules governing the conditions of service of staff members other than permanent employees, within the meaning of Article 33(2)(b) of the Convention. Even if such rules allowed the Office to take individual decisions which are not based on the general conditions of service of this category of staff, they would certainly not authorise it to exempt employees from essential rules determining their conditions of service, such as the age limit or the number of years of service required for entitlement to a retirement pension.

It follows that the Council's decision to authorise an extension of service beyond the age of sixty-five years was not lawful and must be set aside.

As the principal claim succeeds, the subsidiary claim shows no further cause of action.

12. The two staff members concerned have already completed the service envisaged during their extension (one of them for only five months) and the recompense due from the Organisation cannot be denied to them. They accepted the extension in good faith and the EPO must protect them from any prejudice. There are, therefore, no grounds for setting aside *a posteriori* the contracts concluded for the extension of their service.

13. The conditions for granting compensation for moral damages have not been met.

Moreover, the request to impose a penalty on the Organisation for failing to revoke the decision is at the very least premature. In the light of this judgment, it has become devoid of all object.

DECISION

For the above reasons,

1. The decision of the Administrative Council of the EPO, taken at its 65th meeting, to maintain in service two members of the boards of appeal beyond the age of sixty-five years is set aside for the reasons set out above.
2. The Organisation shall pay the complainants the global sum of 2,000 euros in costs.
3. Their other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-EIGHTH SESSION

***In re* Ndhlovu** **Judgment 1898**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Cephas Ndhlovu against the Food and Agriculture Organization of the United Nations (FAO) on 6 July 1998 and corrected on 13 December 1998, the FAO's reply of 16 April 1999 and the complainant's waiver of his right to rejoin;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Zimbabwe born in 1959, entered the service of the FAO on 16 January 1996 on a "casual labour" contract basis as an accounts clerk/administrative assistant at the Sub-Regional Office for Southern and East Africa, in Harare. He was given a series of such short-term contracts at grade G.5. The first contract ran from 16 January to 15 April 1996, and was followed by several others, with no break in service. The last one covered the period from 1 December 1996 to 31 January 1997.

In a letter of 4 January 1996 to the complainant, the acting Sub-Regional Representative told him his employment would be on a casual labour basis and would be probationary until it was confirmed by FAO headquarters; it was also subject to satisfactory performance. Each contract he received included the clause: "Should dismissal for misconduct or unsatisfactory performance be deemed necessary, this contract may be terminated by the Organization with immediate effect upon written notice".

Because his services were not deemed satisfactory the complainant's contract was not renewed beyond 31 January 1997. He therefore wrote a letter of appeal dated 7 February 1997 to the Director-General challenging his termination. In the letter he made comments about the management at the Sub-Regional Office and asked for a review of his situation. On 7 May the Assistant Director-General in charge of Administration and Finance replied on the Director-General's behalf. He told the complainant that the Organization had never indicated to him that he would be offered the job on a permanent basis and that, in view of problems concerning his work, there were no valid grounds for extending his contract. Nevertheless, he informed the complainant that the FAO would be treating his total period of service as a regular appointment at grade G.5 under a fixed-term contract. Payments due to him for that period had been calculated accordingly and he would receive an amount of 12,011.06 Zimbabwean dollars (approximately 1,053 United States dollars), representing the difference between what he had already been paid and what he would have received in terms of salary and annual leave as a G.5 fixed-term staff member.

The complainant was not satisfied with the sum proposed and on 26 June 1997 appealed to the Appeals Committee. However, he subsequently accepted the amount offered. He addressed a further letter to the Committee on 31 July specifying that by way of redress he wanted the Organization to reinstate him and treat him as a permanent staff member at grade G.5 from 16 January 1996. In a report of 12 February 1998 the Committee recommended rejecting his appeal, a recommendation endorsed by the Director-General in a letter to the complainant dated 15 April 1998. That is the decision he now impugns.

B. The complainant states that the FAO infringed the terms of its Administrative Manual since contracts for temporary assistants are given for periods not exceeding three months whereas he had served on a temporary basis for more than a year. On joining the FAO he had hoped to stay much longer than a year. The complainant was constantly told that the FAO headquarters in Rome was to blame for the delay in clarifying his contractual situation. In calculating his revised pay the pension issue was never addressed by the Organization even though a fixed-term appointment carries pension benefits.

The complainant says the Appeals Committee spoke of the "disciplinary" nature of his case, but no disciplinary proceedings were taken. He has had no opportunity to state his case or justify his actions in matters concerning his work. The working atmosphere he was exposed to was intimidating and "scary" and he was subjected to abusive language from his supervisor, the Administrative Officer.

He is seeking reinstatement at the G.5 level as an accounts clerk/ administrative assistant; financial compensation for the period between separation and reinstatement, and "review of [his] entry point at G.5 considering [his] previous salary".

C. In its reply the Organization observes that it did not mislead the complainant with regard to his contractual status. Under the terms of the contracts he signed he could have expected no more than a series of temporary appointments. Paragraph 4 of each of his temporary contracts specified that "the signatory shall not be entitled to any benefit, payment, subsidy, compensation or pension from the Organization, except as expressly provided in the contract". Appendix D to Manual section 374 stipulates that "casual labourers" are not considered to be staff members of the Organization and are not entitled to any of the benefits afforded to FAO staff members.

The complainant was told several times that his performance was unsatisfactory. The Administrative Officer had told him at three meetings of the problems in the administration of the Office's finances. Two audits had revealed problems in his area of work, some of which were attributable to him.

The FAO acknowledged its error in appointing the complainant on contracts that went beyond the three months allowed by Manual section 374 and had compensated him accordingly. The complainant did not appear to question the level of salary paid, but raised the issue of a pension. The Organization based its calculation on the salary and allowances that it would have paid him had he been on a fixed-term contract. It made no deduction for pension contributions or medical insurance, but did allow for an increase in salary that he would have received from September 1996 had he held such a contract.

The Organization considers the complainant's claims to reinstatement, additional compensation and review of salary entry level to be "untenable" and, in the absence of any reasoning by the complainant in support of his claims, it is unable to respond further.

CONSIDERATIONS

1. The complainant held a series of six temporary contracts on a "casual labour" basis until 31 January 1997.

2. Appendix D to Manual section 374 provides:

> "Employment as 'casual labour' does not require prior approval by Headquarters and may be offered for periods not exceeding three months. It may be given repeatedly to the same individual, provided that there is a reasonable interruption between periods, and that the total period of employment does not exceed six months in any 12-month period."

3. He complained to the Director-General on 7 February 1997 about the non-renewal of his contract and the behaviour of the Administrative Officer in charge of the Office, including the use of abusive language.

4. The Assistant Director-General in charge of Administration and Finance replied on behalf of the Director-General on 7 May 1997. He told the complainant there had been "no commitment on the Organization's part that the post would be offered [to him] on a permanent basis", and that because of his unsatisfactory performance his contract had not been renewed. However, the Assistant Director-General said that it had been decided to treat his period of service with the FAO from 16 January 1996 to 31 January 1997 as a regular appointment at the G.5 level under a fixed-term contract. In addition his emoluments would be adjusted in accordance with his status as a staff member, and the amount due to him had been calculated at 12,011.06 Zimbabwean dollars.

5. On 26 June 1997 the complainant appealed against this decision to the Appeals Committee. The redress he sought was to be considered as a permanent staff member as from 16 January 1996 at grade G.5 (step 7 or 8), to be reinstated and paid compensation for loss of earnings from 1 January 1997 to the date of reinstatement.

6. In its report dated 12 February 1998 the Appeals Committee, recognising that the contractual situation had been adjusted and the relevant emoluments paid, was of the opinion that the complainant should have been informed, in conformity with relevant procedures, that his performance was no longer considered satisfactory towards the end of 1996. It noted that the Administrative Officer had acknowledged in the course of a staff meeting held on 3 December 1996 that she had not warned the complainant in writing about his poor performance. The Committee felt that the working environment at the Sub-Regional Office was "tense and problematic" and noted that the Administrative Officer had been transferred in the meantime. It recommended, however, that the appeal be rejected as unfounded but that "particular attention be given to the timely application of the Organization's rules and regulations in field offices".

7. On 15 April 1998 the Director-General dismissed the appeal as being without merit. That is the decision impugned.

8. In his brief the complainant submits that the Organization violated its rules on temporary employment, and says the Appeals Committee cited his case as a disciplinary one but the disciplinary rules were not followed. He is mistaken in this as the Appeals Committee specified that the case did not arise out of a disciplinary action. The complainant further says he was never asked to respond to the issues highlighted in the audit report relating to his field of work. Lastly, he says the Organization admitted its mistake by giving him a fixed-term contract for the period of his service. He queries the calculation of the extra pay due and says that the FAO did not include him in the pensions scheme. His salary was paid net, not gross, and he wonders what happened to the difference.

9. The Organization submits that, if the complainant had been given a fixed-term contract at the outset, his appointment would have been governed by Manual paragraph 374.5 which provides:

> "Fixed-term appointments do not carry an expectation of, or imply any right to, extension or conversion to any other type of appointment. Such appointments expire according to their terms, without notice or indemnity."

10. The FAO acknowledges that the complainant was not informed in writing of his shortcomings, but it does claim that he was informed orally on three occasions of problems concerning the administration of the Office's finance. He was also aware of the reports which criticised work in his field. Also the Organization acknowledged its error concerning his contractual status by treating his service as being under a fixed-term contract and paying the difference in salary. No deductions were made for pension contributions or medical insurance. The figures were net insofar as the staff assessment tax was deducted, as is usual for fixed-term contracts.

11. The Organization submits that the complainant's claim for a review of his entry point on the G.5 scale is not supported by any arguments and there is no basis on which it could be argued. No rejoinder was submitted by the complainant.

12. Since the complainant's period of service was retrospectively treated as a regular appointment under a fixed-term contract, he must be considered a staff member. However, even as such he had no right to expect a renewal of his contract. He is not, therefore, entitled to reinstatement. There is no evidence that the additional emoluments paid were wrongly calculated. Since the complainant is not entitled to reinstatement, the questions of compensation pending reinstatement and reconsideration of the entry level in the grade G.5 do not arise.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

In re **Boivin (No. 2)** **Judgment 1899**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 29 January 1999, Eurocontrol's reply of 7 May, the complainant's rejoinder of 10 August and the Agency's surrejoinder of 15 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute are to be found in Judgments 1768 (*in re* Bodar) of 9 July 1998 and 1870 (*in re* Boivin) of 8 July 1999. The complainant's appointment to a position as an expert at the Agency's Institute of Air Navigation Services in Luxembourg was cancelled as from 31 August 1996, after an employee of the Agency, Mr Bodar, challenged it. The complainant was subsequently appointed to the position of "head of the Accountancy and Personnel Office" of the Institute. Mr Bodar also challenged this appointment and the implied rejection of his internal complaint was quashed by the Tribunal in Judgment 1768, mentioned above. During the process Mr Boivin was invited to submit his point of view, which he did in the form of a brief to the Tribunal. He relied on an expert opinion of a graphologist to show that Mr Bodar has falsified a document.

On 22 December 1997 the complainant asked the Agency to open a disciplinary inquiry against Mr Bodar. He asked that Mr Bodar be sanctioned and ordered to pay him 100,000 euros and that the Organisation compensate him for the moral, professional and financial injury he said he sustained. Having received no reply, on 8 June 1998 he lodged an internal complaint against the implied rejection of his request. In its report of 15 October the Joint Committee for Disputes unanimously recommended rejecting the complaint but suggested that, while not at fault, the Agency seek an amicable arrangement with the complainant to compensate him for the "inevitable stress incurred". By a letter of 17 November 1998, the impugned decision, the Director of Human Resources rejected the internal complaint on the Director General's behalf.

B. The complainant holds the Agency responsible for the injury he suffered as a result of "marital separation" and of having to maintain two households for a prolonged period. He contends that, according to the case law of the Tribunal, the Agency had a duty to protect him against any injury resulting from the cancellation of his first appointment and that the daily subsistence allowance it paid him was not enough to cover the injury actually incurred. He alleges psychological and professional harassment on the part of Mr Bodar and complains that Eurocontrol failed to sanction him.

He estimates the amount of the damages at 1,718,440 Belgian francs, broken down as follows: 190,191 francs for additional accommodation costs following the cancellation of his move to Luxembourg that had been planned for early March 1996; 19,654 francs for additional telephone costs incurred largely by the separation from his wife; 1,525 francs for access to television in Belgium; 89,570 francs for the cost of travel between Belgium and Luxembourg; 337,500 francs for his wife's loss of earnings and 1,080,000 francs for the loss incurred in the sale of his wife's translation business when he had had to move at very short notice.

He seeks the quashing of the impugned decision; the opening of a disciplinary inquiry and the imposition of a sanction against Mr Bodar; material damages in the amount set out above, plus interest; the same amount in moral damages, and costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable because it concerns injury allegedly caused by the cancellation of the complainant's appointment in 1996. It is therefore time-barred. Besides, he already made the claim to moral damages in his first complaint and his claim to the opening of an inquiry would constitute an injunction against the Agency.

In subsidiary pleas Eurocontrol denies the existence of any injury. The cancellation of his first appointment did not interrupt his career, since not only did the Agency continue to pay his salary, but also the daily subsistence allowance to compensate for the uncertainty of his situation, and the household allowance. Therefore, it discharged its obligations under the case law. It points out that since the complainant's probationary period expired on 31 May 1996, it would have been able to confirm his appointment and authorise the removal only as from 1 June. His plan to move early in March was therefore premature and rash. The Agency also has doubts about the alleged injury to his wife. It rejects the allegation of harassment.

Eurocontrol asks the Tribunal to order the complainant to bear the full costs.

D. On receivability, the complainant rejoins that he tried to start negotiations at the beginning of October 1996 and only when the Administration failed to take a decision did he file an official request.

On the merits, he submits that the household allowance is a statutory allowance which is not meant to compensate for injury. He accuses the Director of Human Resources of wanting to dismiss him in order to fall in with the wishes of a staff member who was threatening to challenge all decisions on the reorganisation of the Institute of Air Navigation Services. He produces an attestation from his supervisor at the time, the former Director of the Institute, stating that "the bias on the part of [Director of

Human Resources] … was such" that he had advised the complainant to seek external legal counsel to ensure "proper defence" of his case. The complainant produces a statement from the former Director of the Institute to the effect that, in view of the complainant's excellent performance, he had consented to the removal planned for March 1996. Relying on this statement, the complainant enlarges on his claims: in view of the additional rent he had to pay for seven months, he estimates the amount of material damages at 1,915,960 Belgian francs. He leaves it to the Tribunal to set the amount of moral damages "in the light of Judgment 1870".

E. In its surrejoinder the Agency argues that, the Tribunal having ruled on his claims to financial compensation and moral damages in Judgment 1870, they are *res judicata*.

The attestation of the former Director of the Institute reflects only his personal opinion and constitutes neither a new fact nor evidence. His alleged consent to the complainant's removal has no value in law, as it would have been given without authority. The daily subsistence allowance amply covered the cost of maintaining two households. The Agency did not force the complainant to leave his home in Belgium or sell his wife's company. Nor did it require his wife to live in Luxembourg.

CONSIDERATIONS

1. The facts that gave rise to this dispute, and to which the Tribunal will refer, are set out in Judgments 1768 (*in re* Bodar) and 1870 (*in re* Boivin). The gist of the case is as follows.

By a letter of 6 September 1995 Eurocontrol appointed Mr Boivin, with effect from 1 September 1995, to a position in Luxembourg as an expert. The appointment was to be confirmed after a probation period of nine months. Eurocontrol had picked the complainant from a reserve list of candidates drawn up for a selection process for a post in Brussels requiring similar skills. However, following a successful internal complaint filed by another staff member, Mr Bodar, objecting to the

Agency's failure to put the post up for competition, Eurocontrol cancelled Mr Boivin's appointment and so informed him by a letter of 4 March 1996. It nonetheless kept him on the job provisionally under the economic conditions that would have prevailed had it not cancelled his appointment. Mr Boivin applied successfully for another post put up for competition and was appointed to it as from 1 September 1996. Mr Bodar lodged an internal complaint against that appointment too, but it was implicitly rejected. He therefore went to the Tribunal objecting, among other things, to the Agency's failure to seek the opinion of the Joint Committee for Disputes before rejecting his complaint. In Judgment 1768 of 9 July 1998 the Tribunal upheld his plea and quashed the decision to reject the internal complaint.

In Judgment 1870 of 8 July 1999, the Tribunal ruled on a complaint lodged by Mr Boivin against Eurocontrol's rejection of his claim to compensation. It held that redress was warranted in view of the administrative errors committed by the Agency. It noted that the complainant sought compensation for only part of the alleged material injury (costs for legal counsel and an expert opinion in the complaint ruled on in Judgment 1768), whereas he claimed moral damages for all the non-material injury resulting from the two decisions. The Tribunal awarded him 8,000 euros for damages under all heads. However, it reserved judgment on the elements of material injury for which he sought no redress in the complaint and on any claims to compensation for future injury. It also noted that the Agency had protected him against any loss of earnings by paying him the amount he would have earned had his appointment been confirmed, so he suffered no material injury on that score.

2. The present complaint was filed before the Tribunal delivered Judgment 1870 on 8 July 1999.

On 22 December 1997 the complainant had sent a request to the Director General seeking compensation. He asked him to open a disciplinary inquiry against Mr Bodar whom he accused of conduct prejudicial to him and of falsifying a document. He alleged that Mr Bodar changed the date of receipt, written by hand on the text of an Agency decision notified to him, to a later date and then produced the document to make out that an internal complaint – which was in fact late – had been filed in time (see Judgment 1768 under C *in fine*, 1 and 4). He further alleged that the cancellation of his first appointment had involved him in considerable costs.

Having received no reply within the prescribed time limit, on 8 June 1998 he filed an internal complaint with the Director General, who referred it to the Joint Committee for Disputes. The Committee unanimously recommended rejection on the grounds that the Agency had committed no act for which it might be held responsible, that it was "too late for Mr Boivin to claim compensation in connection with his appointment of 1 September 1996" and that there was "no causal link between the cancellation of his first appointment and the injury of various kinds alleged by Mr Boivin". However, it recommended that the Agency seek an amicable arrangement with the complainant in order to compensate him for the stress he had incurred. The Director General rejected the complaint on 17 November 1998.

That is the decision he is now impugning. He asks the Tribunal to set it aside, to order the Agency to open a disciplinary inquiry against Mr Bodar for his reprehensible behaviour, particularly his falsification of a document for the purpose of deceiving the Agency. He seeks moral damages. He also seeks material damages on the grounds that the cancellation of his first appointment had the effect of delaying his removal from Belgium to Luxembourg, which he had planned for early March 1996 (on the strength of a good probation report), until 6 September 1996. He submits that in the intervening period he had to maintain two households – his wife's in Belgium and his own in Luxembourg – which increased his accommodation and communication costs. The daily subsistence allowance the Agency paid him during that period was enough to cover the additional accommodation costs but not the other elements of injury. The complainant's calculation of the injury is set out in detail below in the discussion of the pleas.

The Agency asks the Tribunal to dismiss the complaint. It submits that the complainant may not request a disciplinary inquiry nor a disciplinary sanction against another staff member. Such action is within the discretion of the Director General and therefore not subject to review by the Tribunal. In this case the Agency had no reason to start such proceedings: Mr Bodar was exercising his legitimate right to appeal, and to have written a wrong date of receipt on an administrative decision, if indeed he did, is less serious than the complainant makes out. As to the injury, the complainant may not submit a claim for which he already received compensation under Judgment 1870. In fact there was no injury, since the costs incurred in maintaining two households were amply covered by the daily subsistence allowance of 1,100 Belgian francs that he received from the time of the first decision to appoint him until 6 September 1996, the date when he actually moved.

3. Disciplinary relations between an organisation and a staff member do not directly concern other members of staff or affect their position in law. Consequently, a decision regarding a disciplinary inquiry or a disciplinary measure relating to one staff member will not adversely affect other staff, so the latter will have no cause of action for challenging a disciplinary sanction or a refusal to impose one.

4. Insofar as the complainant is seeking further moral damages, his claim must fail as *res judicata* under Judgment 1870. The Tribunal recognised in that judgment that he was entitled to moral damages for the harm caused to his personal interests from the time when Mr Bodar challenged the complainant's first appointment up until the quashing of the decision rejecting Mr Bodar's second internal complaint and for its immediate effects, while reserving judgment as to compensation for any moral injury for the subsequent period (see Judgment 1870, under 6 and 10). Mr Boivin's claim does not pertain to that period and so must fail.

Judgment 1870 gave no ruling as to compensation for material injury not alleged in the course of the procedure that led to the judgment. To that extent, the complaint is not *res judicata*.

5. The Organisation submits that the claims to damages are time-barred. The complainant should have submitted them within the time limit set in the Staff Regulations for challenging the decisions that had been deemed unlawful and which had caused the injury, in other words "within three months from the decision of 4 March 1996 cancelling his appointment, or within three months following his new appointment that took effect on 1 September 1996", but he submitted them only on 22 December 1997.

The argument is unconvincing. It overlooks the difference between a claim to the quashing of a decision and a claim to the payment of a sum of money on which there has not yet been a decision. The Agency cites no specific rule on a time limit for monetary claims. In fact, it attempts to infer such a time limit from the time limit for challenging the decisions, by extending the effects of the time bar on these decisions to the related monetary claims. Article 92 of the Staff Regulations, which is about appeals, distinguishes between a "complaint against an act adversely affecting" someone, which must be challenged within three months (Article 92(2)) and a request to the body competent for appointment, for which there is no time limit (Article 92(1)). If the request is rejected by a decision, the latter may be challenged under Article 92(2). To extend the time bar to related monetary claims would have the effect of subjecting those claims to a time limit equivalent to that for attacking decisions. A time limit for such a claim – which would be subject to that set in the Staff Regulations for challenging a decision – would need to be clearly stated. In this connection, the Tribunal stated in Judgments 1502 (*in re* Baillon) under 6, and 1877 (*in re* Serlooten No. 2) under 3 that:

> "If an organisation wants to put procedural restrictions on one of the staff member's rights or on the exercise thereof it must draft clearly enough to avoid setting traps. If it fails to do so, the text may be construed in the staff member's favour."

The two claims can be exercised separately without the risk of any major difficulty. This case in fact illustrates that they are independent of each other. The claim to damages can hardly be linked to a decision that the complainant could have challenged within a given time limit, because he had no reason to challenge his own appointment and probably lacked grounds to challenge the cancellation of the appointment even if it was required by the Organisation's rules. Besides, in many cases injury resulting from a decision can be determined only later.

6 (a) The complainant also claims compensation for material injury resulting from the cancellation of his appointment. It therefore needs to be ascertained whether he suffered material injury in the legal sense.

There is no need to consider the items of injury already dealt with in Judgment 1870.

(b) If there had been no decision adversely affecting him, the complainant and his family would have had the benefit of a long-term appointment and the remuneration of an official confirmed in his post. His family would have moved under the same conditions from Belgium to Luxembourg, with all the advantages and disadvantages that a removal entails.

(c) How did the cancellation of the first appointment change the situation?

In terms of resources received from the Agency, the cancellation of the appointment brought no change, since Eurocontrol paid the complainant the salary he would have received if his appointment had been confirmed.

The cessation of the complainant's former gainful activities, and those of his wife following the removal, would have occurred even if the first appointment had not been cancelled, and so does not in itself constitute injury.

The same holds good for expenditure. At the present stage of the proceedings, costs that the complainant would have in any case incurred in taking up his duties in Luxembourg and moving there cannot be considered as constituting injury.

(d) The complainant alleges, however, that he suffered injury over and above that which can be caused by a change of activity or residence.

(aa) He seeks 190,191 Belgian francs to cover the cost of additional rent.

On the strength of a good probation report written on 6 February 1996, the complainant planned to move in early March 1996 and to observe a period of notice up to the end of July 1996. The cancellation of his appointment obliged him to postpone the removal and pay two rents for an additional period. The removal took place on 6 September 1996 and the notice period terminated at the end of October 1996. According to his reckoning, he paid additional rent (an office and a apartment with various charges) for four months.

(bb) The complainant alleges that the trouble the Agency caused him upset him deeply and for four months he had more frequent telephone conversations with his wife, amounting to an additional 19,654 francs as compared to the average of the other months.

(cc) For those same four months, he also claims 1,525 francs for additional television and radio costs.

(dd) For the period from May to August 1996, for travel costs between Belgium and Luxembourg he claims 89,570 francs.

(ee) For the period from May to September 1996 he claims 337,500 francs to compensate for his wife's loss of earnings.

Mrs Boivin was joint owner with her husband of a translation business in Belgium. The complainant asserts that, "because the contract was cancelled, [his] wife ... had to turn down offers of employment over a prolonged period. ... Without the procedural flaw, that income was guaranteed". He no doubt refers to the income she could have earned in Luxembourg.

(ff) Lastly, the complainant alleges that he sustained a loss of 1,080,000 francs on the sale of the translation business. It had to be sold very quickly, the Agency having required him to move at very short notice. At the end of 1995 the business was valued at 1,250,000 francs, but they were able to sell it for only 170,000 francs.

He estimates the total additional injury at 1,718,440 francs.

Eurocontrol asks the Tribunal to dismiss the claim. It asserts that the injury sustained by the complainant was amply covered by the daily subsistence allowance - 1,100 francs - that it paid him for a year. The purpose of that allowance is precisely to compensate an official for the cost of maintaining two households until he is able to move - until 6 September 1996 in the complainant's case. If he planned to move at the beginning of March 1996, it was at his own risk, as he was a probationer and the Agency may not authorise a removal before the end of the probationary period - the end of May 1996 in his case; so if he was unable to move at the date planned, he cannot hold the Agency responsible for the consequences. Likewise, if his wife started to make arrangements for work in Luxembourg before the end of his probationary period, she did so at her own risk. In fact, the evidence on file shows that she started to make such arrangements after the cancellation of the appointment, in other words at a time when her husband's future with the Agency was uncertain. Besides, Mrs Boivin could have carried on working as a translator. The fact that her husband was required to reside at his duty station did not mean that she had to move to Luxembourg immediately, and it might have been in her own economic interests to stay in Belgium at least until she was able to sell the business on better terms. Eurocontrol observes that it is contradictory to cite the fact that Mrs Boivin was unable to engage in gainful activity in Belgium and Luxembourg during the same period.

In his rejoinder the complainant enlarges on his claims. Citing the fact that the Director of the Institute of Air Navigation Services in Luxembourg, at the material time, authorised him to move in March 1996 – he produces an attestation from the Director to this effect – he rebuts the

Agency's argument that a removal would have been premature and at his own risk. He submits that the injury arose from the fact that his removal was delayed by seven months (and not four). He sets out his claim to damages for those seven months as follows:

		(Belgian francs)
aa)	needless additional rent	331,447
bb)	telephone expenses	(unchanged) 19,654
cc)	television and radio costs	2,669
dd)	travel costs	144,690
ee)	wife's loss of earnings	(unchanged) 37,500
ff)	loss on sale of translation business	(unchanged) 1,080,000
	total	1,915,960

Eurocontrol considers that the daily subsistence allowance paid was sufficient to cover the injury. The complainant admits at the beginning of his complaint that the allowance is deductible but he fails to deduct it from his actual claims.

Payment of such an allowance does not in itself release the Organisation if it is at fault, but the allowance must be deducted from the total compensation where applicable. It is necessary in this connection to separate the periods for which the allowance was due.

For the period from his first appointment until its cancellation, the allowance was paid to the complainant, as to any other staff member, to compensate for the inconvenience inherent in the period preceding settlement in the duty station, so there is no need to deduct this from the compensation relating to the postponement of the removal. However, the amount of the allowance paid for the period corresponding to the postponement should be deducted from the total compensation relating to that period.

According to Judgment 1870, the Agency has a duty to protect the complainant from all injury.

Eurocontrol did ensure that he suffered no injury as a staff member in terms of the salary and related benefits.

However, the complainant suffered additional injury because the removal, which was planned for March 1996, took place only at the beginning of September 1996. During that period he and his wife lived apart, one in Luxembourg and the other in Belgium, and maintained two households.

The complainant cannot be blamed for planning the removal before the end of his probationary period or for halting it following the cancellation of his appointment. His appointment was cancelled not because he had failed to complete his probation successfully but because of a procedural flaw attributable to the Agency. The Director of the Institute for Air Navigation Services, satisfied with the complainant's work, had authorised the removal. In these circumstances, the Agency cannot in good faith blame the complainant for having acted at his own risk. Furthermore, the cancellation of his appointment left him without any contractual status. Although he stood a good chance of being kept on when the post was re-advertised, he could not be certain of winning the competition. It would, therefore, have been unwise to go ahead with the removal and abandon accommodation and other resources in Belgium that he might have needed later if Eurocontrol had not re-appointed him.

In establishing the extent of redress, it is also necessary to bear in mind that the injured party has a duty to take appropriate steps to avoid undue injury. In relations between staff and organisation, this duty is based on the mutual respect they owe each other because they are bound by the same rules.

It is for the complainant to prove the injury for which he seeks redress.

In the light of these considerations, the complainant's claims call for the following comments.

Re: aa)

The complainant gives conflicting information on the length of the delay in his removal. In his complaint he estimates it at four months whereas he mentions seven months in his rejoinder. In the complaint he submits that, in normal circumstances, he should have waited for a probation report to be established in April so that he could then cancel his lease at the end of April, whereas in fact he was unable to cancel it until the end of August. When he drafted his complaint he must have known the date on which he planned to move. The Tribunal will, therefore, retain his first estimate (even though it may not appear altogether accurate). However, for the reasons set out below, this point is not decisive.

In calculating additional costs for rent and incidental expenses, the complainant counts not only the rent of his apartment (21,500 Belgian francs a month) but also that of the translation business (17,500 francs a month) run by his wife. The latter figure is questionable. According to the complainant, evidence on file shows that this business was sold on 25 August 1996, in other words after the complainant had been re-appointed. There was no overlap between the offices in Brussels and the premises leased in Luxembourg. The cancellation of Mr Boivin's first appointment did not prevent his wife from continuing to run the business. On the contrary, if the complainant had not been kept on by Eurocontrol it would have been in his interests to keep the business running. It cannot be established from the evidence on file that he suffered any injury in connection with the operation of the translation business during the period in question.

Furthermore, up until 6 September 1996 when the removal actually took place, Eurocontrol paid the complainant a daily subsistence allowance of 1,100 francs – approximately 33,000 francs a month – to meet the cost of maintaining two apartments. Even taking account of the incidental charges which amounted to some 8,500 francs a month for the two leases, the daily subsistence allowance was enough to pay the rent (21,500 francs) and cover the additional costs arising from the maintenance of two households.

However, Eurocontrol gave the complainant no allowance for the end of the notice period for the apartment in Belgium which, according to the evidence, corresponds to the period from 7 September to the end of November 1996. That does imply additional costs which were not covered. In view of the special circumstances of the case, it was understandable that he should not postpone the removal, and it would be unfair for him to have to bear the additional cost incurred in this latter period of some eighty-five days.

Re: (bb) and (dd)

Although it is very likely that the cancellation of his appointment involved the complainant in additional costs for telephone calls with his wife and travel costs to be with his family, the exact amount has not been established. The daily subsistence allowance should normally be enough to cover such costs but, in view of the circumstances, he may have spent more than he would otherwise have done.

Re: (cc)

The cost of radio and television should also be considered as covered by the daily subsistence allowance.

Re: (ee)

The loss incurred in his wife's earnings is not clearly explained. There would undoubtedly have been no injury if, as a freelance translator, she had been able to carry on working in Belgium earning as much as she could have earned in Luxembourg.

Since there is insufficient evidence to show that she stopped working in Belgium (the translation business was not sold until August 1996, shortly before the removal) or that she could have found gainful employment in Luxembourg at that time, the proof of injury on this count is not sufficiently established.

Re: (ff)

If the complainant did sell the translation business at a loss, the link between the injury he alleges and any fault on the part of Eurocontrol is not sufficiently established. He was informed officially of his new appointment in mid-July 1996 and the translation business was sold on 25 August 1996. He himself says that he "had no opportunity to prepare for the sale of the business" and "had to accept an offer of 170,000 Belgian francs", although it had recently been valued at 1,250,000 francs. However, in his complaint he states that the former Director of the Institute proposed his selection for the post at the end of May 1996. On being so informed he could have started to look for a buyer with a view to concluding the sale when he got the appointment; but he does not say that he did anything of the sort. And, although he was required to move to his duty station immediately upon appointment, his wife was under no such obligation and, if necessary, could have stayed on in Belgium until the business could be sold at a satisfactory price. Therefore, the complainant did have an opportunity to set about selling the business and he must bear the consequences of failing to act with the diligence required by the circumstances.

7. The conclusion is that the injury warranting redress – as claimed by the complainant – is established only in part and on more than one count the exact amount cannot be determined. In these circumstances, in

accordance with the case law, the Tribunal will award the complainant damages in an amount set *ex aequo et bono* which will also take account of the daily subsistence allowance paid until 6 September 1996. It considers that in this case 3,000 euros is an equitable amount plus interest at 8 per cent per annum as from 1 July 1996.

8. Since his main claim succeeds, the complainant is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. Eurocontrol shall pay the complainant damages in an amount of 3,000 euros plus interest at 8 per cent per annum as from 1 July 1996.
3. Eurocontrol shall pay the complainant 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Fattah** **Judgment 1900**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Nasser Dahab Abdel Fattah against the Food and Agriculture Organization of the United Nations (FAO) on 12 September 1998 and corrected on 28 November, the FAO's reply of 11 March 1999, the complainant's rejoinder of 31 March and the Organization's surrejoinder of 11 June 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is of Egyptian nationality and was born in 1956. He was recruited as a driver at grade G.3 to the FAO's Regional Office for the Near East in Cairo. On 1 January 1992 the FAO gave him a one-year fixed-term appointment followed by several consecutive appointments.

On 25 August 1994 the Regional Representative wrote to the complainant warning him that he was not satisfied with his performance and behaviour and that, consequently, he would propose withholding his next salary increment. He attached those comments to the complainant's performance appraisal report for the period from 1 January to September 1994, which was completed in October 1994. By a letter of 13 December

1994 the Director of the Personnel Division informed the complainant that his within-grade salary increment, due on 1 January 1995, was being withheld until his services could be "certified as satisfactory". However, his performance appraisal for the period from 1 October 1994 to 31 January 1996 was again unsatisfactory. In a letter of 12 February 1997 the Director told him that in view of his unsatisfactory conduct there would be no renewal of his appointment beyond 31 March 1997.

On 25 February 1997 the complainant asked the Director to grant him an extension for a "non-extendable" period of six months, and on 4 March 1997 addressed a letter to the Appeals Committee repeating his request for a six-month extension. He also said in that letter that he had had to give up his university course. The Organization treated his letter as an appeal to the Director-General. As he was on sick leave from 17 March to 16 June the date of his separation was postponed to 17 June 1997.

In a reply of 30 April to his appeal the Assistant Director-General in charge of Administration and Finance told the complainant that his request for an extension had been approved and that his contract would end on 30 September 1997. The complainant filed an appeal with the Appeals Committee on 20 May 1997 mainly challenging how the evaluation of his performance had been carried out and who had appraised him. In a report dated 30 March 1998 the Committee noted inconsistencies in his performance evaluations and appointment extensions. It recommended regarding his appointment as having been extended *de facto* up to the end of 1997, and that he be paid compensation equal to the salary and entitlements he would have received had he been employed for that period, including salary increments.

In a letter of 15 June 1998 the Director-General accepted those recommendations and, with a view to settling the matter amicably, offered the complainant an amount of 3,092.11 United States dollars. The complainant did not accept the offer and filed his complaint with the Tribunal impugning the decision of 15 June.

B. The complainant is contesting the non-extension of his fixed-term appointment. He submits that the decision to separate him was based on incorrect facts. In the appraisal report covering the period from January to September 1994 his supervisors rated his performance as unsatisfactory, which led to the withholding of his salary increment. After stopping an increment a report has to be produced within six to nine months, which did not happen in his case. There was a gap of about twenty months before another report was written on his performance and in March 1996 the acting Administrative Officer reported unfavourably on him over that period although he had taken up office only on 1 December 1995.

On 27 August 1996 the Regional Representative recommended the extension of his appointment from 1 January to 31 December 1997 stating on the relevant form: "the conduct of the incumbent staff member has started to improve since his last appraisal report". He was therefore "shocked" to receive the letter of 12 February 1997 from the Director of Personnel informing him that his appointment would not be extended beyond its expiry date of 31 March 1997.

He is seeking reinstatement; compensation for loss of income suffered and the repercussions on his children's level of education, for loss of "social and medical" insurance, for the psychological consequences affecting his ability to work, and for the financial loss incurred, which he sets at 176,471 dollars at least, through having to withdraw from his university course; compensation because applications for employment addressed to many organisations were not dealt with by the Regional Office; and payment of his salary until 19 July 1998 because, contrary to the terms of Manual paragraph 323.512, he was separated while on sick leave. He seeks a total of 1.5 million dollars in "full compensation" for the injury he has suffered.

C. In its reply the Organization points out that the decision not to renew the complainant's appointment for a further year was justified. He was aware of the reasons for the non-renewal and had received written warnings about his performance. Moreover he held a fixed-term appointment and under Staff Rule 302.907 such appointments end "automatically and without prior notice on the expiration date". The Organization extended his contract from 31 December 1996 to 31 March 1997 to allow for notice of separation, and showed yet more flexibility by extending it for another six months to allow him to find employment. It points out that it cannot be held responsible for the "wider effects" of the complainant's circumstances.

It contends that there were no errors of procedure in its decision. Although the Regional Representative had recommended the extension of the complainant's appointment, the decision not to renew it was taken at headquarters level, based on two unsatisfactory performance appraisals and written complaints about his conduct. While it is true that the Regional Administrative Officer had only been with the Regional Office for three months when the second appraisal report was completed, he had been the complainant's direct supervisor for that period; the Regional Representative had been there for the whole of the period covered by the report and was aware of the complainant's shortcomings.

Because of the complainant's unsatisfactory performance his within-grade salary increment was withheld from 1 January 1995. Under Manual paragraph 315.324 the increment is only granted again after the Director of Personnel issues an express recommendation to that effect. In the complainant's case he did not consider that the increment was justified and instead favoured separation. Moreover Manual paragraph 308.416 provides that -

> "a staff member whose service has been reported as unsatisfactory for two successive qualifying periods is subject to transfer, demotion or separation".

D. In his rejoinder the complainant develops his pleas. According to the letter of 25 August 1994 from the Regional Representative about the withholding of his salary increment a second report on him was to be produced within six months, but none was done within that time period. He also submits that it was the wife of the Representative who was against him: the problems arose when he was acting as her driver.

He contends that the Organization put "obstacles" in his way when he sought alternative employment and had disclosed information about his performance to other organisations.

He claims that his salary should be paid every month until his case is "settled".

E. In its surrejoinder the Organization observes, as regards the timing of the performance appraisal, that the purpose of the letter of 25 August 1994 from the Regional Representative was to inform the complainant that his salary increment was to be withheld as from January 1995 and to tell him that the extension of his contract would be subject "to a further evaluation to be made after six months". In his letter of 13 December 1994 the Director of Personnel merely confirmed the suspension of the increment until his services could be "certified as satisfactory". The Organization was not under any obligation to produce a report within exactly six months: it followed a course of "discussion and negotiation" up to the time the next report was submitted in April 1996.

The complainant has in no way proved that the Organization communicated details of his performance to other United Nations organisations. His allegation that the FAO rendered his obtaining work with other organisations difficult is therefore unsubstantiated. Likewise he has submitted no evidence to prove that the reason for his non-extension was that the wife of the Representative did not like him as a driver.

With regard to his claim for salary until his case is settled, it observes that the filing of a complaint does not suspend the effects of non-renewal.

CONSIDERATIONS

1. The complainant attacks a decision of the Director-General contained in a letter dated 15 June 1998 in which he offered him an amount of 3,092.11 dollars, representing the salary and allowances that he would have received had he been retained in employment until 31 December 1997 and retroactive payment of salary increments.

2. The letter of 15 June 1998 was in response to the complainant's appeal against the Administration's decision that his appointment, which was to expire on 31 March 1997, would not be renewed. Subsequently, the complainant was granted sick leave from 17 March until 16 June 1997. This had the effect of delaying the date of his separation until 17 June 1997.

3. In the meantime, on 30 April 1997 another administrative decision had been rendered on the complainant's appeal of 4 March and the term of his appointment had been extended, as he had specifically requested, for six months, to 30 September 1997.

4. The effect of all the foregoing was to give the complainant more than he had requested and to deprive the appeal against the 12 February 1997 decision of any substance. In addition, the complainant fails to prove that the impugned decision was unfair or arbitrary. There is, therefore, no basis on which that decision can be set aside.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Blazianu**

Judgment 1901

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Nicolas Jean-Charles Blazianu against the European Organization for Nuclear Research (CERN) on 22 December 1998 and corrected on 10 February 1999, CERN's reply of 20 May, the complainant's rejoinder of 26 July and the Organization's surrejoinder of 29 September 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1942, joined CERN on 1 September 1968 as a technician/operator at grade 5. He was promoted several times and in 1995 was on grade 9.

By a decision of 17 June 1985 the district court of Bourg-en-Bresse (France) pronounced his divorce from his wife, also a CERN staff member, and gave custody of their two children to the mother. For the children's maintenance, it ordered the complainant to pay alimony to his former wife and to make over to her the family allowances paid to him by CERN. On 28 October 1985 the former spouses signed an agreement whereby the family allowances were to be deducted from the amount of the alimony.

On several occasions - in particular in May 1990, March 1991, May 1991 and October 1993 - the complainant assaulted or seriously threatened his former wife. As a result of his conduct CERN gave him numerous warnings, sometimes with sanctions, and the French authorities arrested him on 17 May 1991 (he was released under judicial supervision on 24 June 1991) and gave him an eight-month suspended prison sentence in June 1994. He also underwent a medical examination in 1991 at CERN's request.

By a decision of 21 December 1993 the Court of Appeal in Lyon adjusted the amount of alimony set in the divorce decree, and reversed the agreement to deduct the family allowances from the amount of the alimony. The complainant disregarded that decision and continued to deduct the allowances. By a letter of 8 August 1994 the Director of Administration of CERN informed him that the Finance Division would withhold from his pay an amount set in a distraint order issued by the Receivers' Office of the Canton of Geneva and that the family allowances would be paid directly to his former wife pursuant to the decision of the Court of Appeal and in accordance with Staff Regulation R IV 1.17.

On Monday 13 February 1995 the complainant informed his supervisors by telephone that during the weekend he had dismantled and removed a large number of components of the Proton Synchrotron accelerator. He said that he would return the stolen equipment if CERN dismissed his former wife and paid him 2 million francs. The Organization reported the matter to the French police. The complainant was arrested on the evening of 13 February and placed in custody.

On 23 February the Director of Administration told the complainant that in view of the gravity of the act and its serious consequences for the Organization, he was to be dismissed without notice. He was given eight days to explain his actions. By a letter of 28 February 1995 the complainant asked the Director of Administration for more time. The Organization having agreed to his request, the complainant wrote a letter to the Director of Administration on 1 March 1995, in which he admitted to his wrongdoing and attributed it to the suffering caused by the dispute with his former wife and the Organization's attitude to the matter. By a letter of 16 March the Director-General told him that nothing he had said in his letter of 1 March could excuse the misdeed and that he would be dismissed for "seriously harmful" acts and "unspeakable behaviour" as from 31 March 1995. By a letter of 29 May the complainant informed the Director-General that he would not appeal against the decision to dismiss him for serious misconduct and that he accepted the nature and gravity of the sanction.

By an order of 14 June 1995 the Bourg-en-Bresse district court released the complainant on the strength of a report drawn up by a forensic psychiatrist, dated 22 May, which concluded that at the material time the complainant had been suffering from a "mental disorder depriving him of his power of judgment". At the same time the complainant was committed to a psychiatric hospital. On 24 July the court ruled that the case would not proceed to judgment because the complainant was not criminally responsible for his acts.

Relying on that decision, on 10 November the complainant asked to be reinstated with retroactive effect. On 28 November 1995 the Director of Administration replied that the decision of the French court had no bearing on the measure taken by CERN. By a letter of 12 January 1996 to the Director-General, the complainant said that as a result of the court's ruling and the conclusion it drew about his state of health the Organization should review the reasons it gave for his dismissal. In a letter of 2 February he asked for an "invalidity" pension, and reiterated that he was not contesting his dismissal. By a letter of 11 October 1996 the Administrator of the CERN Pension Fund informed him that he was entitled to a deferred retirement pension and may at any time apply for an anticipated retirement pension. By a letter of 16 March 1998 the complainant asked the Administrator to recognise his entitlement to an incapacity pension or failing that to a pension for unsuitability. Articles II 3.01, II 3.02, II 4.01, II 4.02 and II 4.04 of the Rules of the Pension Fund read as follows:

> "Article II 3.01: Definition
>
> The term 'incapacity' covers the case where a member becomes totally or partially incapable of performing his duties on account of a consolidated illness or accident.
>
> Article II 3.02: Entitlement to Total Incapacity Pension
>
> A member dismissed on grounds of medically confirmed incapacity shall be entitled to a total incapacity pension.

> Article II 4.01:Definition
>
> Unsuitability is the reduction, presumed to be permanent or long-term, by at least 1/3 in earning capacity resulting from a deterioration in physical or mental health, which occurred while the person concerned held a contract with one of the participating Organizations.
>
> Article II 4.02: Establishment of Unsuitability
>
> Unsuitability or the likelihood of unsuitability shall be established not later than at the medical examination required by the Staff Rules and Regulations on termination of service.
>
> Article II 4.04: Entitlement to Pension for Unsuitability
>
> Subject to the provisions of Articles II 4.01 and II 4.02, a member shall be entitled to a pension for unsuitability upon leaving the employing Organization for a reason other than resignation or dismissal owing to a disability confirmed by a medical certificate, or upon the occurrence of unsuitability the likelihood of which had been established in accordance with the provisions of Article II 4.02."

By a letter of 15 June 1998 the Administrator of the Pension Fund replied that, according to Article II 3.02 of the Rules of the Pension Fund, he did not qualify for an incapacity pension because he had not been dismissed on grounds of medically confirmed incapacity.

On 6 July 1998 the complainant lodged an appeal with the Chairman of the Governing Board of the Fund against the decision of 15 June. He submitted that psychiatric reports since 1991 showed him to be unfit for work and that the Organization should have dismissed him in 1995 on grounds of medically confirmed incapacity. The Chairman replied in a letter of 30 September 1998 that since he had not been dismissed for medically confirmed incapacity and did not qualify under the Rules of the Fund for either an incapacity or an unsuitability pension, it was pointless to start appeal proceedings. He, therefore, allowed him to come directly to the Tribunal.

B. The complainant contends that he is entitled to an incapacity pension because he can no longer fully perform his duties owing to an illness that he had at the time of his dismissal or even before.

He rebuts the Fund's argument that he is barred from such a pension because the reason stated in the letter of dismissal was serious misconduct and not medically confirmed incapacity. In his view, what grounds the letter gave is of little import. What matters is whether there is a sufficient causal link between the grounds given and medically confirmed incapacity.

Nor does it matter if the incapacity was confirmed later, provided that it existed at the time of his dismissal and was the real cause of it.

He points out that medical reports since 1991 have established that he suffered from a mental disorder that could lead to behaviour incompatible with his duties. The medical experts who examined him in May 1995, barely three months after the events that prompted his dismissal, are categorical: he committed the act of sabotage in a moment of madness. Consequently, medically confirmed incapacity was clearly at the origin of the act that prompted his dismissal. A causal link between the dismissal and the incapacity has therefore been established.

In subsidiary pleas the complainant contends that he is entitled to a pension for unsuitability. His unsuitability should have been established at the latest in the medical examination that staff members must undergo upon separation. But CERN ordered no such examination in his case. It is a breach of good faith to deprive him of such a pension when it is still possible to establish that the medical examination would have shown conclusively that his earning capacity was reduced by one-third.

He asks the Tribunal to quash the Pension Fund's decision of 15 June 1998 and the decision of 30 September 1998 of the Chairman of the Governing Board of the Fund, to declare that he is entitled to an incapacity pension or failing that to a pension for unsuitability with effect from 13 February 1996, and to send the case back to the Pension Fund to determine the amount of the incapacity or unsuitability pension.

C. In its reply CERN contends that the complainant does not qualify for an incapacity pension because he was dismissed not for medically certified incapacity but for exceptionally serious misconduct. It submits that he is not challenging the lawfulness of the Administrator's decision or its consistency with the Pension Fund rules, but is attempting to challenge the decision of 16 March 1995 to dismiss him. But that decision may not be challenged in the context of this procedure. The complaint is therefore unfounded.

In subsidiary pleas CERN submits that the complaint would have been unfounded even if it had challenged – within the time limits – the decision dismissing him, because the conditions for dismissal on grounds of medically confirmed incapacity were not met. His supervisors had always found his performance satisfactory. Neither CERN's medical officers nor his own doctors found any general limitation of his capacity to work. The expert that CERN appointed to examine him in 1991 concluded that he was fit to work and that his problems were not medical in nature.

The French court's decision not to judge his case following the sabotage in February 1995 does not alter that assessment. In his report the forensic psychiatrist said that at the time of sabotage the complainant was suffering from a mental disorder that deprived him of judgment, but he only concluded that the complainant was not criminally responsible. However, an act committed when he was momentarily in the grip of a mental disorder that made him non-liable under penal law cannot be assimilated to, nor does it presuppose, a general incapacity to work. Nor can it be concluded from the later medical certificates, three years after the event, that the complainant was totally incapable of performing his duties at the time of his dismissal in 1995.

CERN points out that, according to the rules, dismissal for medically confirmed incapacity involves a clearly defined procedure before the Joint Advisory Rehabilitation and Disability Board. In the complainant's case the requirements for opening such a procedure were not met.

Furthermore, since when he left the Organization no reduction in his earning capacity had been noted, he does not qualify for a pension for unsuitability either. As to his objection that CERN failed to order a medical examination upon his departure from service, it was unable to do so because he was imprisoned immediately after the sabotage.

Lastly, the Organization points out that it paid the complainant unemployment benefit from 1 April 1995 to 24 May 1996 and he may at any time apply for an anticipated retirement pension.

D. In his rejoinder the complainant acknowledges that he was dismissed for serious misconduct and not medically certified incapacity, but asserts that he asked CERN several times to review those grounds on the strength of new facts unknown at the time: the behaviour that prompted his dismissal arose from a medical incapacity due to psychiatric reasons. He submits that a request for such a review is a fundamental right and is of new facts unknown at the time: the behaviour that prompted his dismissal arose from a medical incapacity due to psychiatric reasons. He submits that a request for such a review is a fundamental right and is subject to no time limit. He asserts that the Pension Fund is part of the legal structure of CERN and has no independent legal status. Consequently, his request to the Fund should be treated as a request to CERN. He submitted it for the first time in his letter of 16 March 1998 in which he asked the Organization to convene a meeting of the Joint Advisory Rehabilitation and Disability Board to rule on the validity of his request; "this letter should [in his submission] have been forwarded to the Director-General of CERN, in view of its purpose and its claims".

He contends that it would be plain to any psychiatrist that, in view of the manner in which the sabotage of February 1995 was committed, it cannot be ruled out that it was the act of "a madman deprived of all power of judgment". In his submission the issue is not whether the Organization should have anticipated a deterioration in his health, but whether "objectively" in February 1995 his mental state was such that it warranted dismissal on grounds of medically confirmed incapacity.

The complainant submits new claims. He asks the Tribunal to quash the decision of 16 March 1995 to dismiss him in so far as it is based on exceptionally serious misconduct and to state that the reason for the dismissal was medically confirmed incapacity. As a subsidiary claim he asks the Tribunal: to order a medical assessment of his state of health to establish whether, in February 1995 and at the date of his dismissal, he was incapable of performing his duties owing to illness; or to order that the Joint Advisory Rehabilitation and Disability Board rule on the matter.

E. In its surrejoinder CERN submits that, since he is unable to produce any convincing arguments, the complainant is attempting to pass off his claim of 16 March 1998 to an incapacity or an unsuitability pension as a claim to a review of CERN's decision of 16 March 1995 to dismiss him. According to him, the claim has not been submitted before and should, therefore, be treated as receivable. But his argument is contrived and indefensible both in fact and in law.

First, the letter of 16 March 1998 was addressed to the Pension Fund and does not, therefore, constitute a request to the Director-General for a decision, under Rule VI 1.02 of the CERN Staff Rules. The fact that the Pension Fund has no separate legal personality from the Organization is immaterial in this context and certainly affords no grounds for concluding that a letter sent to the Fund should also be treated as a request to the Director-General for a new decision.

Secondly, in terms of its content the letter does not seek a review of the decision dismissing the complainant, but makes a

> "formal request for recognition of [an] entitlement to an incapacity pension, or failing that a pension for unsuitability within the meaning of the Rules and Regulations of the CERN Pension Fund and to payment of a total incapacity pension, or failing that a pension for unsuitability."

Even if the letter of 16 March 1998 had sought a review of the decision to dismiss him and had been addressed to the Director-General, the present complaint would be irreceivable. In that hypothesis CERN's refusal would merely be a confirmation of an earlier decision, since the complainant had already sought a review of the decision dismissing him on the strength of the ruling handed down by the Bourg-en-Bresse district court. The Organization rejected that request in its letter of 28 November 1995. Having failed to challenge that rejection within the prescribed time limit, the complainant may not now challenge it by submitting a new claim. Besides, he formally undertook in his letter of 29 May 1995 not to contest his dismissal.

CONSIDERATIONS

1. The complainant joined CERN on 1 September 1968. He was dismissed on 16 March 1995 for exceptionally serious misconduct, without compensation or notice, with effect from 31 March 1995. As from 1990 he had numerous disputes with his former wife, also a staff member of CERN, some of which earned him disciplinary sanctions or penal sentences. Events came to a head in February 1995 when he dismantled and removed a large number of components of the Proton Synchrotron accelerator and informed his supervisors that he would return the stolen

equipment if the Organization dismissed his former wife and paid him 2 million francs. The French police arrested him on 13 February 1995. He was released under judicial supervision on 14 June and committed to a psychiatric hospital. The French court ruled on 24 July that the case would not proceed to judgment, the examining magistrate having found him "not criminally responsible for the acts of which he [was] accused". Citing that ruling, on 10 November 1995 the complainant asked to be reinstated retroactively in his former job, but CERN replied on 20 November 1995 that "the decision of the French criminal court ... [had] no bearing on the measure taken by CERN". Though dissatisfied with the response, the complainant did not formally contest it. In a letter of 2 February 1996 he stated that he did "not intend to challenge the decision to dismiss [him]", but was applying for an "invalidity" pension. In October 1996 the Administrator of the CERN Pension Fund told him that he was entitled to a deferred retirement pension under Article II 2.03 of the Rules of the Fund.

2. By a letter of 16 March 1998 to the Administrator the complainant submitted a formal claim to an incapacity pension or, failing that, a pension for unsuitability. The Administrator rejected his claim on 15 June 1998 on the grounds that he had not been dismissed for medically certified incapacity. The complainant appealed against that decision to the Governing Board of the Fund, but on 30 September 1998 the Chairman of the Board upheld the decision and allowed the complainant to go directly to the Tribunal in accordance with the Fund's Regulations for appeals.

3. In his complaint to the Tribunal the complainant seeks the quashing of the decisions of 15 June and 30 September 1998 and recognition of his entitlement to an incapacity pension or failing that to a pension for unsuitability. In his rejoinder he enlarges on his claims, seeking the quashing of the decision of 16 March 1995 to dismiss him in so far as it was based on exceptionally serious misconduct. He also asks the Tribunal to declare that he was dismissed on grounds of medically confirmed incapacity or, failing that, to order a medical evaluation or the convening of the Joint Advisory Rehabilitation and Disability Board.

4. In so far as the complainant is now challenging the decision of 16 March 1995, those claims are obviously irreceivable. They were never submitted in the internal proceedings and, moreover, they are inconsistent with his affirmation dated 29 May 1995 that he would not challenge the decision to dismiss him. The decision of 16 March 1995 has become definitive in its entirety and the complainant may not submit an initial claim to its quashing in a brief filed on 26 July 1999 in the context of a dispute with the Pension Fund.

5. The complainant is attempting to avoid the time bar by submitting that he is challenging the Organization's rejection of his request of 16 March 1998 which was to be construed as a request to have his position reviewed in the light of new elements. But apart from the fact that the request for a review of the grounds for his dismissal was not clearly worded and was addressed to the Administrator of the Pension Fund, who was not competent to rule on the matter, it contained no element that might lead the Organization to reconsider a decision it had taken three years earlier and which had become final.

6. In order to determine the complainant's entitlements to an incapacity pension or a pension for unsuitability, it is necessary to refer to the material provisions of the Pension Fund Rules.

7. Article II 3.02 of the Rules says "A member dismissed on grounds of medically confirmed incapacity shall be entitled to a total incapacity pension". As noted above, the complainant was dismissed for misconduct and not for medical incapacity. Having failed to appeal properly against the decision dismissing him, it is no longer open to him to challenge before the Pension Fund the reasons for dismissal and allege that he was dismissed on grounds of a mental disorder (see Judgment 1665 *in re* Palma).

8. As to his subsidiary claim to a pension for unsuitability, the material rules are those cited above under A. The complainant asserts, not altogether wrongly, that he did not undergo a medical examination on termination of service and that he asked several times to have his

entitlement to an "invalidity pension" recognised. The defendant argues that it could not arrange a medical examination for him at the time of his dismissal because he was in prison. It adds that it relied on a medical check-up that he had undergone on 18 January 1995, in which no such health problem was noted as to indicate a reduction in his earning capacity.

9. The Tribunal cannot accept that argument. Under Article R II 4.18 of the Staff Regulations, a medical examination is compulsory when a contract is terminated, for whatever reason. In view of the particular circumstances of the case, CERN should have been at particular pains to comply with that rule. In the absence of such an examination the Pension Fund should have determined whether, upon termination of service, the complainant was to be treated as unfit for work because of a deterioration in his physical or mental health which occurred while he was employed by CERN. The Administrator of the Pension Fund was, therefore, wrong in June 1998 when he refused to consider the complainant's entitlement to a pension for unsuitability. The Tribunal can only send the case back to the Pension Fund (a) for it to determine, on the basis of all the medical evidence and a medical examination in accordance with Article II 4.02 of the Pension Fund Rules and, if appropriate, after consulting the Joint Advisory Rehabilitation and Disability Board, whether, at the date on which he left the Organization, the complainant qualified for an unsuitability pension, and (b) to come to a decision on the award of such a pension.

DECISION

For the above reasons,

1. The decision of 30 September 1998 of the Chairman of the Governing Board of the CERN Pension Fund is set aside in so far as it refuses to consider the complainant's entitlement to a pension for unsuitability.
2. The case is sent back to the CERN Pension Fund for it to consider the complainant's entitlement to a pension for unsuitability in accordance with 9 above.
3. The other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-EIGHTH SESSION

***In re* Mathaba** **Judgment 1902**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Rosemary Ntokozo Mathaba against the International Labour Organization (ILO) on 7 January 1999 and corrected on 2 February, the ILO's reply of 13 May, the complainant's rejoinder of 22 June and the Organization's surrejoinder of 31 August 1999;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In June 1995 the ILO decided to set up an area office in Pretoria, South Africa, which would become operational in mid-1996. The complainant, a South African born in 1953, was working for a magazine in Cape Town in 1995; she was an experienced librarian and had previously worked for the United Nations Development Programme (UNDP) and the United Nations Children's Fund (UNICEF). The ILO recruited her on an "external collaboration" contract to organise files received from various ILO offices and set up a registration system for correspondence. Her contract ran from 27 November to 26 December 1995, during which period she was on unpaid leave from her employer in Cape Town. At that time the staffing needs of the area office were not clearly known but it was expected that a position of librarian would be created and the complainant expressed interest in it. Meanwhile the ILO appointed her as a registry clerk at grade L5 on a short-term contract for three months, from 4 January to 31 March 1996, and she resigned from her previous employment.

On 19 February 1996 the Director of the area office had occasion to tell the complainant that her attitude towards other officials, as well as her language, were not acceptable. On 22 February he sent her a minute warning her that her contract would not be extended on the ground that her attitude was "incompatible with the team spirit" that he wanted to foster in the office. Following an intervention by the Deputy Director of the area office and the Staff Union he gave her a second chance and extended her contract to 30 June 1996, subject to satisfactory performance.

The complainant addressed a memorandum to the Director-General on 15 April 1996 expressing dissatisfaction with her conditions of work and alleging unjustified treatment by the Director. On 30 April the Chief of the Personnel Administration Branch requested her to make her grievances the subject of a complaint under Article 9.1 of the rules governing conditions of service of short-term officials. She did so in three memoranda dated 5, 6 and 10 June. She alleged that she was treated inconsistently with the rules and the terms of her contract and was "subjected to unjustifiable treatment by a superior official". These memoranda were treated by the Organization as having been received on 19 April 1996, the date it had received her initial communication.

The Director of the area office then wrote to her on 19 June 1996 to say that there had been no improvement in her performance and there would be no renewal of her contract on its expiry. She replied on 20 June expressing surprise and saying that as she had heard nothing about her performance since 20 February she assumed it was satisfactory. She asked for "urgent action" from headquarters to resolve the situation.

The Director of the Personnel Department wrote to her on 27 June 1996 acknowledging receipt of her complaint under Rule 9.1 and informing her that copies would be communicated to the four officials cited therein for comments. The Director also pointed out that her contract would still expire on 30 June. The comments received were subsequently notified to her and she duly replied.

By a detailed letter of 8 May 1998 the Director of Personnel informed the complainant of the decision of the Director-General to reject her internal complaint. The complainant wrote a further letter of appeal to the Director of Personnel on 21 May, asking for reconsideration of that decision. The Chief of the Personnel Administration Branch confirmed to her in a letter of 10 July 1998 that the decision of the Director-General was a final one and said that her only recourse was an appeal to the Tribunal within ninety days from receipt of the decision as stipulated in Article VII(2) of the Statute of the Tribunal. It became clear from correspondence, however, that she did not receive the letter despatched in July, as she continued to press for an answer. The Director of Personnel wrote to her on 29 September reiterating what the letter had said, and a copy of it was e-mailed to her on 29 October 1998. It is the letter of 10 July that the complainant cites as the impugned decision.

B. The complainant contends that the Director of the area office "maltreated" her by the minutes he wrote to her, and took advantage of his position of authority over her. She maintains that the ILO did not identify what she had failed to do in her job of setting up the registry.

She submits that when offered the position of registry clerk she was led to believe that it would become a permanent position, and understood that she had been placed on a three-month short-term contract while medical clearance was sought from headquarters in Geneva. She resigned from her job in Cape Town and relocated to Pretoria at her own expense. Performing her duties was rendered difficult as she lacked the appropriate equipment to do her job: she had no computer until two weeks before the end of her contract.

The loss of her appointment at the ILO "destabilised" her finances and she blames the ILO for her precarious financial situation. She asks for the quashing of the decision of the Director-General and claims a total of 82,382.92 South African rand to meet sundry debts, bills and expenses incurred that she lists.

C. In its reply the Organization holds that her complaint is clearly irreceivable. It is directed against the letter of 10 July 1998 from the Chief of the Personnel Administration Branch, but there is nothing in the wording of that letter that can be construed as a final decision. Appeal lay only against the decision of the Director-General contained in the letter of 8 May which the complainant is known to have received on or before 21 May 1998. Under Article VII(2) of the Statute of the Tribunal she had ninety days from receipt of the decision in which to lodge a complaint with the Tribunal. In no way did her subsequent requests for review set a new time limit: it lapsed on 20 August, about five months before she filed her complaint.

Ignorance of appeal procedure could not excuse her non-compliance with the time limit and in any event the complainant was to blame for frustrating the efforts of the Organization to make her aware of her rights. The two copies of the letter of 10 July which the complainant did not receive were returned to the ILO by the postal services, marked "unclaimed", because she had refused to collect them from the post office.

Inasmuch as the complainant claims compensation for expenses indirectly related to the non-renewal of her contract, it could be construed that she is challenging the decision not to renew it, which she received on 19 June 1996. Her complaint, however, would still be irreceivable since she failed to exhaust the internal remedies open to her. It would further be devoid of merit as Article 3.4(b) of the Short-term Rules provides that: "appointments shall expire automatically and without prior notice". The complainant was aware that renewal hinged on satisfactory performance. She had also received written confirmation that her contract would not be renewed beyond 30 June.

Further, on the merits, the Organization argues that she has given no indication in her complaint filed with the Tribunal that the Director of the area office was biased against her or subjected her to unfair treatment. In the Organization's view he acted in a "legal and legitimate" manner.

D. In her rejoinder the complainant additionally claims a total of 4,750,000 United States dollars in moral damages for "emotional torture" and "mental harassment" that she accuses the ILO and its officials of inflicting on her.

She points out that she did contest the non-renewal of her contract. She did so before it expired in the minute of 20 June 1996 to the Director of the area office, a copy of which was sent to the Director of Personnel in Geneva. As she is "still on the payroll of ILO Pretoria" the complainant claims "what is due" to her regarding the original assurances of the Organization that her short-term contract would be followed by a fixed-term one.

She acknowledges receiving the Director-General's decision of 8 May on 21 May 1996, but there was no accompanying information about recourse to the Tribunal. The letter of 10 July 1998 from the Chief of the Personnel Administration Branch was not received by her because it was wrongly addressed.

In her opinion the Director should have given her a performance report in line with labour law requirements: she considers that she was the victim of unfair treatment.

E. In its surrejoinder the Organization presses its objections to receivability. It observes that the complainant's new claims to financial redress did not form part of her internal appeal.

It holds that the despatch by the Administration of the letter of 10 July to the wrong address does not relieve the complainant of her responsibility to file a complaint within the time limit. The appeal process is clear from Rule 9.2 of the Short-term Rules of which she had received a copy. It was for the complainant to ensure that correspondence would reach her when she changed address. Because of the complainant's "lack of minimum courtesy" the ILO restricted its correspondence to just what was necessary to fulfil its duty towards her.

In no way can her minute of 20 June 1996 be construed as challenging the decision of 19 June 1996 not to renew her contract.

Moreover, the complainant has not substantiated her allegations that she received assurances of an established position. She accepted the contract at Pretoria at her own risk. The Director of the area office extended the complainant's short-term contract by three months which was evidence of a comprehensive attitude towards her personal situation.

CONSIDERATIONS

1. In the complaint she lodged with the Tribunal on 7 January 1999, the complainant impugns the letter of 10 July 1998 that she says she did not receive until 29 October 1998, when a copy was e-mailed to her from headquarters. In that letter the Chief of the Personnel Administration Branch confirmed that the Director-General's decision of 8 May 1998 to reject her internal complaint for unjustified treatment was final.

2. The relief the complainant seeks is the payment of the sum of 82,382.92 South African rand to pay outstanding debts and bills which she lists. These appear to result from her inability to pay due to the decision of 19 June 1996 not to renew her contract against which she never appealed. She interpreted the Director-General's decision rejecting her internal complaint to mean that she "deserved to be maltreated" and asks for it to be quashed. However, she grossly misrepresents that decision.

3. While the question of receivability is raised by the Organization the Tribunal prefers to reject the complaint on the merits and will treat the decision of 8 May 1998 as being the decision impugned.

4. First of all, in relation to the decision not to renew her contract beyond 30 June 1996, the complainant refers to her memorandum dated 20 June 1996 to the Director in Pretoria saying she failed to understand why her contract had not been extended and asking for urgent action from headquarters to resolve the situation. The Director replied the same day saying he had nothing to add to his letter of 19 June in which he refused to extend her contract further in view of her performance.

The complainant failed to take any further action. Therefore, the decision of non-renewal was not challenged.

5. In her internal appeal the complainant contends: that she was told she would get a fixed-term contract after the short-term one, subject to a medical examination; that she was "being singled out as if being punished" by being deprived of certain benefits and allowances from which other colleagues benefited; that she was not provided with a copy of the Short-term Rules or with documentation she needed to guide her in the performance of her duties; and that the Director subjected her to "intimidation, threats, mental harassment [and] emotional torture".

6. Before any decision was taken on her appeal extensive interviews were held and the results were communicated to the complainant who was given an opportunity to comment.

7. In the Director-General's reasoned response of 8 May 1998 it was pointed out that the decision not to renew her contract was justified because of her difficult working relationships with several of her colleagues and her unsatisfactory performance. There was no breach of equality of treatment since she was employed under different conditions from the other staff members she mentioned in her internal complaint. As to lack of documentary guidance, the Director-General pointed out that she was assigned tasks within her competence and had shown that she was able to perform them correctly. She had the possibility of asking for guidance from staff members who were assigned to the office to train local staff. He, therefore, said he failed to see how lack of written material could have affected her performance. He also said that she failed to establish that she had suffered any injury from not having been supplied with a copy of the Short-term Rules. He reviewed the evidence relating to the allegation of unjustifiable treatment by the Director and concluded that he had not treated her unfairly: he had even agreed to give her a second chance if her performance improved.

8. In her pleadings the complainant revisits her original complaints.

9. The Organization points out that renewal depended on satisfactory performance, a condition the complainant did not meet. There is no evidence to indicate that the Director acted with bias against the complainant.

10. Having reviewed the various enquiries conducted by the Organization, the Tribunal finds no flaw in the Director-General's decision of 8 May 1998.

11. The complaint is dismissed on the merits without deciding on the several issues on receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Berger** **Judgment 1903**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Bert Louis Maria Berger against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 January 1999, Eurocontrol's reply of 1 April, the complainant's rejoinder of 26 April and the Organisation's surrejoinder of 18 June 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian who was born in 1971, joined Eurocontrol as a trainee controller. In February 1995 he was appointed as an air traffic "controller 2nd class" at grade B4 and became established in that position on 1 November 1995 at Eurocontrol's Upper Area Control Centre at Maastricht in the Netherlands. He was subsequently promoted to "controller 1st class" at grade B3 also with effect from 1 November 1995. He lives in the Belgian town of Diepenbeek, which is approximately 35 kilometres from Maastricht, where he was recruited.

He received an expatriation allowance, but not an installation allowance. Article 1 of Rule No. 8 of the Rules of Application of the Staff Regulations provides that:

> "An installation allowance ... shall be paid to an established official who qualifies for expatriation allowance or who furnished evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations."

Article 20 provides:

> "A servant shall reside either in the place where he is employed or at no greater distance therefrom as is compatible with the proper performance of his duties."

On 12 November 1997 he applied for payment of the installation allowance with effect from 1 November 1995 and claimed interest. In a memorandum dated 28 April 1998, the Human Resources Directorate refused him the installation allowance because an official recruited at or near his or her place of employment is not entitled to this allowance. The complainant lodged an internal complaint against this decision on 8 July 1998. Having received no response from the Director General the complainant filed this complaint with the Tribunal on 21 January 1999.

On 26 January the Director of Human Resources wrote to him on behalf of the Director General endorsing the favourable opinion of the Joint Committee for Disputes dated 23 November 1998 and informed him that the installation allowance would be paid to him with effect from the date of his establishment. By a memorandum of 26 February 1999 the head of the Legal Service wrote to the complainant stating: "I understand that as soon as you receive the payment of the installation allowance together with interest, you will withdraw your complaint".

On 27 February 1999 the allowance was paid to the complainant. He was then also paid simple interest at a rate of 8 per cent per annum as from 1 November 1995 plus a mutually agreed sum of 50 euros to cover his costs. By a memorandum of 9 March 1999 he requested clarification from the Legal Service as to the amount of the installation allowance and the way the interest would be calculated, and stated that when an acceptable offer was made to him, he would withdraw his complaint. By a memorandum dated 15 March 1999 the complainant was told that the amounts had been calculated correctly.

In his complaint to the Tribunal he impugns the implied rejection of his internal complaint of 8 July 1998.

B. The complainant, interpreting Rule No. 8, contends that an established official like himself who qualifies for expatriation allowance is automatically entitled to an installation allowance. The Agency's view that the receipt of the expatriation allowance does not automatically entitle him to such payment is "in direct contradiction" with that Rule.

He seeks the quashing of the decision of 28 April 1998 refusing to grant him installation allowance; the payment of the allowance and "legal interest on the amount due"; and costs.

C. In its reply the Organisation does not contest the receivability of the complaint. It submits that since it has now paid the allowance to the complainant as well as interest and costs, the latter has obtained satisfaction. If the complainant fails to withdraw his complaint, he should be ordered to bear all the costs, since his action would now only be "vexatious".

On the merits, it replies in summary form. It states that benefiting from a "literal interpretation" of the texts, the complainant was granted the installation allowance solely because he receives the expatriation allowance.

D. In his rejoinder the complainant rebuts the arguments put forward in the reply. He has not "obtained satisfaction" through the payments made to him because both the allowance and interest amounts have been incorrectly calculated.

The Agency's calculation of the allowance was based on the B4 grade he held as a "controller 2nd class" at the time of his establishment. He was promoted to grade B3 as "controller 1st class" with effect from 1 November 1995. As he became an established staff member on the same date, his allowance should be based on grade B3. Further, the interest should be calculated as compound interest and not as simple interest.

E. In its surrejoinder the Agency presses its arguments. It submits that an official may receive the installation allowance once he has been established and the calculation is based on the grade upon establishment. The complainant's conclusion that the installation allowance paid to him should be calculated on the basis of grade B3 is not justified under the applicable regulations and is "unacceptable" given the clarifications that he has already received on this matter. The decision to promote him does not modify the decision concerning his establishment as they are "two separate decisions which have separate legal effects". It rejects his claim for compound interest as "inadmissible and improper".

CONSIDERATIONS

1. The complainant was appointed as an air traffic controller at grade B4, step 2, on 1 February 1995. He was established in his position at that grade and step on 1 November 1995 at the end of his probationary period.

2. By a decision of 21 December 1995 he was promoted to "controller 1st class" at grade B3, step 1, with effect from 1 November 1995, the date of his establishment.

3. On 12 November 1997 the complainant requested the installation allowance provided for under Article 1 of Rule No. 8. That Article provides:

> "An installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in other cases shall be paid to an established official who qualifies for expatriation allowance or who furnished evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations."

4. The Organisation rejected his claim on 28 April 1998 on the grounds that receipt of an expatriation allowance did not automatically entitle a staff member to payment of an installation allowance. In his case, he was recruited at approximately 35 kilometres from his place of employment.

5. The complainant lodged an internal complaint on 8 July 1998 against that decision and not having received a reply within the time limit allowed in Article 91(2) of the General Conditions of Employment governing staff at the Maastricht Centre, lodged a complaint with the Tribunal on 21 January 1999 against the implied rejection of his appeal,

claiming payment of the installation allowance, interest and costs. The Organisation does not contest the receivability of his complaint.

6. On 26 January 1999 the Director General endorsed the opinion of the Joint Committee for Disputes which had recommended that the complainant be given the installation allowance with effect from the date he became an established member of staff as well as "customary legal interest".

7. The installation allowance was calculated on the basis of grade B4, step 2, with 8 per cent interest from 1 November 1995, and it was agreed that a sum of 50 euros for costs incurred in lodging the present complaint would be paid to the complainant.

8. The complainant claims the allowance should be calculated by reference to grade B3, step 1, by reason of his promotion which took effect on 1 November 1995, the date of his establishment.

9. Article 1(3) of Rule No. 8 provides:

> "The installation allowance shall be calculated by reference to the official's marital status and salary either on the effective date of his establishment or on the date of his transfer to a new place of employment."

10. The Organisation argues that the complainant was paid on the basis of his grade upon establishment. The establishment decision was different to the promotion decision and had different legal consequences.

11. According to Rule No. 8 the allowance is calculated by reference to the salary on the date of establishment. The complainant's salary was increased retroactively by the Organisation in respect of that date. Therefore, it is the increased salary that must be taken into consideration when calculating the installation allowance.

12. There is no basis on which the complainant is entitled to compound interest. He is, however, entitled to simple interest at 8 per cent per annum on the sum due.

13. He has already been paid 50 euros for costs incurred in bringing this complaint; however, he is entitled to a further sum for pursuing it to judgment which the Tribunal fixes at 500 euros.

DECISION

For the above reasons,

1. The implied decision is set aside.
2. The complainant is entitled to have the installation allowance calculated on the basis of grade B3, step 1.
3. The complainant is entitled to simple interest at 8 per cent per annum on unpaid sums as from 1 November 1995.
4. The complainant is entitled to a further sum of 500 euros for costs.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

EIGHTY-EIGHTH SESSION

***In re* Schopper (No. 2)**
(Application for interpretation
and execution)

Judgment 1904

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the interpretation and execution of Judgment 1629 filed by Miss Doris Schopper on 30 September 1998, the reply of 17 December 1998 from the World Health Organization (WHO), the complainant's rejoinder of 12 January 1999 and the WHO's surrejoinder of 23 March 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions:

CONSIDERATIONS

1. This is an application for interpretation and execution of Judgment 1629 in which the Tribunal set aside a decision to terminate the complainant's service on the grounds of abolition of post. This judgment formed one of a series of similar cases (Nos. 1624 to 1631) concerning former staff of the Global Programme on Aids (GPA). The relief granted was either reinstatement as set out in paragraph 24 of the judgment or the payment of damages as set out in paragraph 25 and in either case the application of the reduction-in-force procedure.

2. The Organization opted to pay damages in accordance with paragraph 25.

3. The complainant does not contest the way in which the reduction-in-force procedure was applied; she does contest the fact that in calculating the damages to which she was entitled, the Organization:

(i) did not include payment of contributions to the United Nations Joint Staff Pension Fund and the Staff Health Insurance for the period from 1 January 1996 to 24 July 1998; and

(ii) did not deduct from her occupational earnings the amount of her contributions to an alternative health insurance plan during the same period.

4. The complainant argues that in paragraph 24 of Judgment 1629 the Tribunal held that she was entitled to "reinstatement with payment of salary and allowances and benefits due under her contract", which included the payment of contributions to the Pension Fund and the Staff Health Insurance. She submits that her participation in the reduction-in-force exercise implied that she was still a staff member and the Organization recognised this in paying three months' salary in lieu of notice at the unsuccessful conclusion of the exercise. She cites Judgments 1374 (*in re* González and others) and 1748 (*in re* Limage No. 2) in support of her contention.

5. The Organization argues that since it exercised the option of paying damages, separation took place on 1 January 1996 and the complainant then ceased to be a staff member. Only if the complainant had actually been reinstated would she have been entitled to continue to be a participant in the Pension Fund and the Staff Health Insurance. Taking part in the reduction-in-force exercise and payment in lieu of notice did not mean that the complainant had been reinstated.

6. The cases cited are not in point. In neither of those cases were the organisations offered the option of paying damages in lieu of reinstatement.

7. A similar claim was made in Judgment 1797 (*in re* Weiss No. 2), a case that is like the GPA ones. In that instance the Tribunal said, under 13, that it "did not order the Organization to reinstate the complainant in the Pension Fund or health insurance plan since it did not reinstate him in employment".

8. The Tribunal is satisfied that the same considerations apply in the present case. Once the Organization exercised the option of paying damages, it meant that separation took place on 1 January 1996 and the right to participation in the Pension Fund and the Staff Health Insurance no longer existed. Neither the reduction-in-force exercise nor payment in lieu of notice alters the fact that no reinstatement took place. Therefore, the complainant is not entitled to succeed in this claim.

9. The complainant claims to be entitled to be given credit for payments made to an alternative health plan pending the conclusion of the reduction-in-force exercise by deducting them from her occupational earnings. This claim is based on the premise that she was entitled to continuing membership of the Staff Health Insurance until 24 July 1998, which is incorrect.

10. No deductions were made from her salary for any contributions by her to the Staff Health Insurance. Therefore, she did not bear the cost of health insurance twice. This claim also fails.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Friel**
(Application for interpretation and execution)

Judgment 1905

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the interpretation and execution of Judgment 1629 (*in re* Schopper) filed by Mr Patrick George Friel on 27 October 1998, the reply of 26 January 1999 from the World Health Organization (WHO), the complainant's rejoinder of 23 February and the WHO's surrejoinder of 10 May 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for interpretation and execution of Judgment 1629. The complainant was an intervener in that case and, having been found to be in the same position in law and in fact as Miss Schopper, was entitled to benefit from that judgment, save as to costs.

2. Like Miss Schopper, the complainant claims that he, too, was entitled to payment of contributions by the Organization to the United Nations Joint Staff Pension Fund and the Staff Health Insurance.

3. For the same reasons as those set out in Judgment 1904 of this day (*in re* Schopper No. 2) he fails in this claim as he was never reinstated as a staff member and was therefore not entitled to continue his participation in the Pension Fund and the Staff Health Insurance.

4. The complainant suggests that the arguments advanced in his case are different from those in the case of Mr Weiss (Judgment 1797). He asks that the issues discussed be examined *ab initio*. He claims that Judgment 1629 required the Organization to treat the complainant – an intervener – as remaining in service until the reduction-in-force procedure was completed. This entailed paying contributions to the Pension Fund and the Staff Health Insurance until that period expired.

5. The complainant is mistaken. The arguments may differ but the principle is the same. Judgment 1629 gave the option to the Organization either to reinstate or to pay damages. Where damages were paid there was no reinstatement and, therefore, no question of ordering the payment of the claimed contributions.

6. In addition, the complainant claims that compensation should have been paid to him for the loss of home leave entitlement in 1995. He applied for home leave on 3 July 1995 for the period from 5 to 19 July 1995 and it was authorised on 5 October 1995. He says he did not find it possible to take home leave in the autumn of that year in view of his heavy work schedule.

7. The WHO says that on 3 July 1995 the complainant did not fulfil the condition in Staff Rule 640.3.2 that his service should be "expected to continue at least six months beyond the date of return from home leave or six months beyond the date of eligibility for home leave, whichever is later". However, it informed him orally that if he wished to travel in July it would exceptionally reimburse the cost if his contract was subsequently extended to 31 December. When the extension was granted in October 1995, the home leave which he requested to take in July was approved subject to proof of travel.

8. The Organization affirms that if the complainant had indeed taken home leave in July 1995 he could have claimed reimbursement for it. The WHO says it is under no obligation to pay compensation for home leave the complainant did not take and for which, therefore, he incurred no expense. Staff Rule 860 precludes the payment of cash to a staff member to compensate for failure to exercise a home leave entitlement.

9. In Judgment 1588 (*in re* Tuffuor No. 2), in circumstances where a decision to dismiss the complainant was set aside, the Tribunal refused a claim for compensation for home leave which was not taken. It said, under 6, that there was no question of refunding fictitious expenditure.

10. Accordingly, the complainant is not entitled to any compensation for home leave which he did not take.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Bauer**

Judgment 1906

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Stefan Bauer against the United Nations Industrial Development Organization (UNIDO) on 8 February 1999, UNIDO's reply of 20 May, the complainant's rejoinder of 5 July and the Organization's surrejoinder of 8 October 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian national who was born in 1963, joined the staff of UNIDO on 1 August 1996 as an investment promotion expert and Deputy Head of the Investment Promotion Service (IPS) in Vienna on a one-year fixed-term contract at grade L.2.

By a memorandum of 6 May 1997 the Officer-in-charge of the Project Personnel Service informed the complainant that his contract, due to expire on 31 July 1997, would not be extended. He confirmed in a memorandum of 27 May to the complainant that the reason for the non-renewal of his appointment was his failure to comply with the requirements of his job description. He told the complainant that whereas his job description required him to carry out his duties "under the supervision of the Head of IPS/Vienna" he had "been working independently without integrating [his] activities into the activities of the Office as a whole" which hampered the functioning of the IPS. In a memorandum of 30 June the complainant asked the Director-General to review the decision not to renew his appointment, but it was maintained and the Director-General so informed him in a letter of 29 July. The complainant filed an appeal on 22 September 1997 with the Joint Appeals Board. One of the Board's findings was that he had not complied with the terms of his job description, and it recommended that the appeal be dismissed. The Director-General endorsed its recommendation in his decision of 19 November 1998 which the complainant impugns.

B. The complainant contends that the decision not to renew his appointment was "flawed and biased", and was taken in breach of UNIDO's directives on the performance evaluation procedure. An appraisal was the only valid way of assessing his performance, but his supervisor and the Personnel Services failed to complete even the initial steps of the evaluation process. He submits that any advance warning to him about the way he was performing his duties should have been substantiated by a completed report.

He refutes allegations made by the Organization in the internal appeal procedure that he did not comply with his job description and "overstepped" the limits in negotiations with an Austrian bank. He was preparing a draft agreement and his actions did not contravene UNIDO standard practices.

He says that new charges were brought against him during the appeal procedure to bolster the Organization's stand, including allegations of "financial misconduct", such as use of the official phone for private purposes. The Organization drew biased conclusions from those accusations. If there had been any truth in them it would have taken steps to terminate his employment at an earlier stage.

He argues that he had a legitimate right to be considered for an extension of appointment. The Organization still needs the type of services he provided.

During the internal appeal procedure it was alleged that he had misrepresented facts regarding his previous employment in his personal history form. He maintains that the Organization was simply trying to discredit him.

He seeks the quashing of the decision not to renew his appointment; the equivalent of one year's net salary by way of redress; and moral damages equivalent to a year's net salary in view of the "gross misrepresentation" of the facts surrounding both his previous employment record and subsequent service with UNIDO.

C. In its reply the Organization contends that the impugned decision was lawful, and was not flawed by the absence of a performance evaluation report. The complainant held up the issuing of the report by not filling in the part relating to a work plan despite reminders he was given. On 16 January 1997 his direct supervisor drafted a work plan for him and sent him a revised version of it on 11 February; he was expected to give his opinion on it. When he failed to comply his supervisor sent a confidential report, dated 17 February, to the Officer-in-charge of the Project Personnel Service criticising the complainant's services.

The Organization asserts that the complainant's conduct fell short of the standards expected of a staff member. The complainant questioned the authority of his supervisor and concealed information from him. He also failed to comply with the procedure for preparing and negotiating agreements as set out in bulletin DG/B.19 governing the establishment of relations between UNIDO and other organisations. He made phone calls to countries he did not need to contact as part of his work, a matter that was brought to his attention before the start of the internal appeal proceedings.

It was within the Director-General's discretionary power not to renew the complainant's contract, and reasons for not doing so were given. Citing the case law of the Tribunal, the Organization also submits that the Director-General may simply allow a contract to expire even when the conduct of a staff member warrants disciplinary action. UNIDO did not, therefore, err in choosing non-renewal instead of instituting disciplinary proceedings against him.

In view of his conduct and the nature of the contract he had the complainant could not reasonably have believed that his appointment would be extended beyond 31 July 1997. He had received repeated warnings about his conduct and his relationship with his supervisor was impaired. The contract he signed on 1 August 1996 specified that the appointment carried "no expectancy of renewal". Moreover, under the terms of Staff Rule 210.02(b), "separation as a result of expiration of a fixed-term appointment shall take place automatically ... on the expiration date specified in the letter of appointment".

The Organization states that facts relating to his personal history form became known during the internal appeal procedure and played no part in the decision not to extend his contract. There are no grounds for an award of damages to the complainant, and he has adduced no evidence of moral injury.

D. In his rejoinder the complainant presses his pleas and reasserts his claim for damages. As regards the work plan he had to prepare as part of his evaluation, he observes that he was not given a performance evaluation form, and the work plan he was given was only a "vague description of his functions".

He says that his supervisor had been informed about the project with the Austrian bank and he had asked his supervisor to have the agreement forwarded to the Legal Service for clearance. He maintains that the telephone calls at issue were job-related.

Regarding the confidential report on him sent by his supervisor to the Officer-in-charge of the Project Personnel Service on 17 February 1997 – produced by the Organization with its reply – he points out that he did not know about it at the time it was despatched and was, therefore, deprived of his right to reply.

E. In its surrejoinder UNIDO maintains its arguments and comments on issues raised by the complainant. It rejects the complainant's assertion that he had not received the evaluation form. Besides, the complainant knew what the formal requirements of the evaluation exercise were.

With regard to the agreement with the Austrian bank, the Organization states that the complainant has not put forward any proof to show that he had informed his supervisor of the agreement or that it went to the Legal Service before it was communicated to the bank.

The Organization rejects the complainant's allegation that he had been deprived of his right to reply to the confidential report on him. Personnel Services had discussed the issue with him at the time and the complainant had received a copy of it as he indeed says in his internal appeal.

CONSIDERATIONS

1. The complainant attacks a decision of the Director-General of the United Nations Industrial Development Organization (UNIDO) dated 19 November 1998 accepting the recommendation of the Joint Appeals Board and rejecting the complainant's appeal against the administrative decision of 29 July 1997 not to extend his one-year contract when it expired on 31 July 1997.

2. The decision not to renew or extend a fixed-term appointment upon its expiry is a matter falling squarely within the discretionary authority of an international organization. The Tribunal will not interfere with such a decision unless it can be shown that it is vitiated by one of a very limited number of errors. The threshold for review is high and the Tribunal will not second-guess the Administration's decision simply because it might itself have come to a different conclusion.

3. The complainant takes four points which he frames as attacks upon the recommendation of the Joint Appeals Board:

(a) no valid performance evaluation report was completed prior to the decision not to renew his appointment;

(b) the Appeals Board erred in concluding that the complainant had not properly complied with the terms of his job description;

(c) the complainant had a legitimate expectation of renewal;

(d) the complainant did not misrepresent facts about his previous employment.

There is no merit to any of these arguments.

4. The Tribunal is satisfied that the absence of a performance evaluation report was due entirely to the complainant's own failure to participate and cooperate in the preparation of such a report.

5. With respect to the complainant's performance of the duties of his position, the Administration has presented convincing evidence that he exceeded his authority and entered into improper and unauthorised negotiations on behalf of the Organization, failing to keep his supervisor properly informed and to comply with the latter's directions. The complainant's attempt to write a special role for himself into a draft agreement which he negotiated with an Austrian bank was rightly viewed by his superiors as unacceptable.

6. There were a number of other relatively minor instances of insubordination and improper activity by the complainant which were noted by UNIDO. The complainant argues that, since none of these was ever made the object of disciplinary proceedings against him, they cannot be invoked as reasons in support of the decision not to renew his contract. The complainant is wrong. An organization is never under an obligation to launch disciplinary proceedings against a staff member and, where that person's appointment is drawing to an end, the fact that there are possible disciplinary infractions on his part may properly be considered when the Administration is deciding whether or not to offer him a new contract.

7. In Judgment 1405 (*in re* Moore) the Tribunal said:

> "Since disciplinary proceedings are irrelevant to non-renewal of a fixed-term appointment the complainant may not properly allege hidden disciplinary action. Disciplinary proceedings, and the safeguards they afford, are relevant in the event of misconduct warranting disciplinary action while an official is under contract, and one possible sanction is termination of the appointment, whatever its duration may be. Disciplinary proceedings do not apply in the event of due expiry of a fixed-term appointment, when the issue is whether in the light of past performance the contract should be renewed. An organisation must be allowed full freedom to decide the issue without having to go through the disciplinary procedure. So there is no question of abuse of process."

8. The complainant had no legitimate expectation of renewal of his contract. As a fixed-term official he of course had a right to be considered for reappointment and, if not reappointed, to be given the reasons for such

decision. If, however, as was the case here, the reasons for non-renewal are grounded primarily in the official's own unsatisfactory performance and date back to well before the time that the contract was due to expire, the Administration is quite entitled to undertake a search for a replacement prior to the contract's date of expiry. When an official by his own actions renders himself unacceptable for reappointment there is no longer any obligation on the part of the organization to consider him for such reappointment. That is what happened in the present case.

9. Finally, whatever be the rights or wrongs of the suggestion that the complainant did not frankly reveal the reasons for leaving his previous employment the Organization concedes that this was not a factor in the decision not to reappoint him.

10. For the foregoing reasons, the Tribunal is unable to find any defect in the decision not to extend the complainant's contract after its expiry that would be of such a nature as to permit the Tribunal to intervene.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Reis-Ekelund** **Judgment 1907**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Patrick Reis-Ekelund against the International Office of Epizootics (OIE) on 6 April 1999, the OIE's reply of 21 June, the complainant's rejoinder of 9 September, and the OIE's surrejoinder of 21 October 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States and Sweden who was born in 1968, entered the service of the OIE in Paris on 9 December 1997 as an administrative assistant, at grade 4 in category III, in the Administrative and Financial Department on a two-year fixed-term appointment.

Part of his duties involved reviewing the administration, finance and activities of the OIE regional offices. On 27 October 1998 he informed the Head of the Administrative and Financial Department of certain accounting discrepancies that he had identified in the accounts of the regional office for the Americas. The Head of that Department had a meeting with the complainant on 26 November 1998 and criticised aspects of his work and behaviour. On 7 December 1998 the Deputy Head of the Department sent the complainant a letter, of which copies were sent to the

Head of Department and the Director-General, which contained criticisms of the complainant's preparations for two meetings.

Those negative comments were put into his annual professional appraisal report which was produced in early 1999. On 12 February the Director-General noted on the report that those "difficulties" called into question the complainant's future with the Office. On 15 February the complainant contested the report, adding on the appraisal sheet that he might "have to draw the entire matter to the attention of other bodies".

The Director-General decided to refer the matter to the OIE's Administrative Commission. On 18 February the complainant had a brief meeting with the President of the OIE's International Committee who also presides over the Administrative Commission. He met him again the next day when the President told him that he would be asked to submit to the Director-General a summary in writing of his observations on the financial discrepancies.

Also on 19 February the complainant received a letter from the Director-General saying that the matter of his appraisal report had been put before the Administrative Commission in conformity with Article 40.12(d) of the Staff Rules and it had expressed its "confidence in the position taken by the Director-General". He also asked for a note on the anomalies found in the accounts. The complainant submitted his comments on 24 February 1999.

On 26 February the Director-General handed the complainant a letter informing him of his decision to terminate his employment on the ground of unsatisfactory service under Article 8.1 of the Staff Regulations. His duties ceased the same day and he received an indemnity equal to three months' pay in lieu of notice under Article 80.2 of the Rules. In a letter he wrote to the Director-General on 26 March the complainant indicated his intention to submit his case to the Tribunal, which he understood the Director-General had agreed to during their meeting on 26 February. The Director-General's decision of 26 February, which is the one impugned, was confirmed in a letter of 6 April.

B. First, the complainant submits that his complaint is receivable. Article 10.1 of the Staff Regulations provides that:

> "The parties may agree that the case will be submitted to an independent person, designated by the President of the Administrative Tribunal ... to recommend a solution for the case."

He is not asking for an independent person to be appointed and has therefore filed his complaint pursuant to Article 10.2 which allows access to the Tribunal regarding a controversy "which could not be solved on the application of Article 10.1".

Secondly, he submits that the decision to terminate his employment is tainted with procedural irregularities and he did not get a fair hearing. The procedure followed after he had objected to his appraisal report did not conform to that laid down in Article 40.12(d) of the Staff Rules whereby if, within ten days of receiving the staff member's contesting comments the Director-General is unable to resolve the matter "in such a way that the staff member withdraws in writing his objections" then he should refer the matter as quickly as possible to the Administrative Commission. The Director-General consulted the Commission too soon. The complainant says that he contested his appraisal report on 15 February 1999. The Office received his comments on 16 February, and so the earliest date for consulting the Commission was 2 March 1999. In sending him the letter of 7 December 1998 containing negative criticisms of his work the Deputy Head of his Department did not respect the appraisal procedure laid down in Article 40.12(a).

He points out that by virtue of Article 1.9 of the Staff Regulations the Director-General is bound to "respect the provisions of the Basic Texts of the Office". Also, the OIE has a duty to respect the rules protecting the rights of international civil servants and to treat the complainant with "consideration and fairness".

Thirdly, the decision was based on incorrect facts. The only reason given for dismissal was that his services had ceased to be satisfactory: he did not receive information on what his shortcomings were. His services were considered satisfactory until he mentioned the accounting anomalies. In his opinion his dismissal was a hidden disciplinary measure and the way the OIE managers treated him in the last four months of his appointment amounted to harassment.

If the Tribunal does not order reinstatement he seeks: (1) the quashing of the impugned decision; (2) two years' salary in material damages;

(3) one year's salary in moral damages; (4) a written apology signed by the Director-General; and (5) 25,000 French francs in costs. If the Tribunal does order reinstatement he seeks the same relief, but instead of material damages he asks for the immediate payment of all outstanding salaries and benefits due from the date of dismissal up to reinstatement.

C. In its reply the OIE raises no objections to receivability. It observes that the decision to dismiss the complainant was not flawed and that according to the Tribunal's case law the Director-General has a margin of discretion in deciding to dismiss a staff member on the grounds of unsatisfactory service. Since July 1998, there was a marked deterioration in the manner in which the complainant performed his duties, and the quality of his work and his professional relations were the subject of comment, complaints and discussions. The decision to dismiss him was taken in the interests of the Office: the complainant had been notified in writing and reasons had been given in various interviews and notes. Termination with an indemnity in lieu of notice under Article 80.2(b) was necessary for the smooth running of the support service for the regional offices. He was remunerated as though he had been in service up to 26 May 1999. His services and behaviour did not justify dismissal on disciplinary grounds.

Article 40.12. of the Staff Rules prescribes the procedure to follow when annual reports are contested. The OIE followed that procedure, the matter was submitted to the Administrative Commission as soon as possible and the decision of the Commission was communicated to the complainant. The terms of that article do not preclude a supervisor from sending a member of staff other written comments such as those of 7 December 1998 from the Deputy Head.

As shown by reports of an internal and external auditor the allegations of anomalies in the accounts of the regional office for the Americas proved to be unfounded which in turn cast doubt on the complainant's competence.

D. In his rejoinder the complainant presses his claims. Many of the OIE's statements against him were put for the first time in its reply and he refutes its claim that his work was lacking in any way. He could not produce the corroborative details concerning the accounts at issue because he did not have access to the relevant file after 9 November 1998. The evidence produced by the Office to disprove that there were any accounting discrepancies dates from April 1999, after his dismissal.

Contrary to the procedure allowed for in Article 40.12(b) of the Rules, he was not given an opportunity to read and countersign the Deputy Head's comments of 7 December 1998 criticising his performance. Furthermore, the two "interviews" with the President of the OIE's International Committee did not constitute a fair hearing: his discussion with him centred on the accounting issue and not on his appraisal. The memorandum which the Director-General wrote to him on 19 February 1999 stated that the Administrative Commission had expressed confidence in the position adopted by the Director-General, but its conclusion was reached without the Commission having seen his own comments of 24 February to the Director-General, which he had been asked to draft.

The OIE considered that his employment had ceased on 26 February 1999, instead of 31 May 1999 at the end of the three-month notice period. The complainant considers that to be "blatantly unfair". He suffered financial loss and his coverage under the French social security system was affected.

E. The OIE maintains the arguments put forward in its reply and points out that it is clear from his rejoinder that the complainant kept copies of documents related to his professional activities with the Office. It respected the maximum periods allowed for each step in contesting an appraisal as set out in Article 40.12 of the Rules. Within ten days of the complainant's contesting his report the Director-General, who was aware of the diverging opinions, referred the matter to the Administrative Commission.

The OIE points out that the complainant was in charge of liaison with the regional offices. He was not responsible for the monitoring of their income and expenditure "at a more technical and operational level". That remained the responsibility of the accountant. There were certain known difficulties in the office concerned and the discrepancy identified "was the result of errors made by the complainant".

At the time of his dismissal disciplinary proceedings were not applicable as he was dismissed through his "unsuitability … to provide the services expected of him", and not for intentional breach of a rule of conduct to be respected by international civil servants.

CONSIDERATIONS

1. The complainant attacks a decision of the Director-General of his former employer, the International Office of Epizootics (OIE), dated 26 February 1999, which was confirmed on 6 April, terminating his employment on the grounds of unsatisfactory service.

2. The complainant joined the OIE on 9 December 1997 on a two-year contract as an administrative assistant. His first few months of service appear to have been entirely satisfactory but in the autumn of 1998 a number of difficulties began to become apparent in his performance and his relations with his supervisors and fellow employees. In September and October the Head of the Administrative and Financial Department wrote to him concerning problems with his work and on 26 November 1998 he called him for an interview at which he was told that his work did not respect the Office's standards, that his attitude and behaviour towards colleagues were unsatisfactory, and that he lacked experience in certain aspects of his duties. On 7 December 1998, the Deputy Head of the Administrative and Financial Department wrote to him about further problems and expressed criticisms of his work. On 10 December the complainant was convened by the Director-General to give him an opportunity to explain himself.

3. On 29 December 1998, the complainant's Head of Department sent him a note outlining their discussion of 26 November and expressing dissatisfaction with the complainant's services. He was asked "to amend [his] working practices".

4. On a report form completed by the Director-General on 12 February 1999, the latter indicated that the various criticisms of the complainant's services called into question his future with the Office. At

the initiative of the Director-General, the complainant was accorded an interview with the President of the International Committee of the OIE, who also presides over the Administrative Commission, on two successive days, 18 and 19 February 1999. At those meetings the complainant continued to insist, as he had on a number of previous occasions, that he had discovered irregularities in the accounts of the Office's regional office for the Americas, notwithstanding the fact that those accounts had been examined by both the internal and external auditors of the OIE and had specifically been found to be in order.

5. Finally, in a meeting with the complainant on 26 February 1999, the Director-General, considering that the complainant's services had ceased to be satisfactory and were no longer compatible with the interests of the Office, handed him a letter which stated that his employment was terminated in accordance with Article 8.1 of the Staff Regulations. That decision, confirmed by the Director-General on 6 April 1999, is the one impugned.

6. The complainant was given an indemnity equal to three months' pay in lieu of notice and no separate issue arises in that regard.

7. The complainant argues that the decision is procedurally flawed as being in breach of Article 40.12 of the Staff Rules and that he was not given a proper opportunity to respond in person to the charges against him. He also alleges breach of procedural fairness and affront to his dignity and reputation. He says the impugned decision was based on inaccurate facts, reflects a pattern of bias against him and was a form of hidden disciplinary action.

8. There is no substance to these arguments. The record shows clearly that the complainant was given ample opportunity to respond, and did respond, to the complaints made about his services.

9. As the Tribunal recently affirmed in Judgment 1817 (*in re* Jassogne) an international organisation has broad discretionary powers to determine whether a staff member is fit for employment and the Tribunal

will only intervene in such decisions on limited grounds. No such grounds have been established here. The complainant was given ample notification of the decision and of the reasons for it. He was also given an opportunity to be heard and to provide his comments during the entire process.

10. The argument based on Article 40.12 of the Staff Rules is also untenable. The relevant part of that article reads:

> "If, within ten working days ... the Director-General is unable to resolve the matter ... [it] shall be placed as soon as possible before the Administrative Commission."

Manifestly, this text does not require the Director-General to wait ten days before referring the matter, but rather allows him up to ten days to resolve the question on his own before making such a referral.

11. The allegation that the complainant was a victim of bias is unsupported by any evidence whatever.

12. Finally, as to the substance of the decision, the evidence, far from showing that the decision was based on a wrong or improper appreciation of the facts, indicates that the complainant's actions, in particular with regard to the accounts of the OIE's office in the Americas, were wholly unjustified.

13. There being no basis for interfering with the impugned decision, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Allaert (No. 2) and**
Warmels (No. 5)
(Application for execution
and Interlocutory order)

Judgment 1908

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr Eric Jaak Allaert and Mr Rein Herm Warmels on 2 August 1999 for the execution of Judgment 1821, the reply of 8 October from the European Southern Observatory (ESO), the complainants' rejoinder of 25 October and the Observatory's surrejoinder of 4 November 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1821 delivered on 28 January 1999 the Tribunal ruled on complaints filed by Mr Allaert and Mr Warmels against decisions taken by the Director General of the ESO on 13 May 1997 refusing to modify the 0.7 per cent adjustment applied to their pay as from 1 January 1996. The Tribunal quashed those decisions, considering that the Observatory had failed to give an adequate explanation of the discrepancy between the adjustment rate it had set and the index of 1.3 per cent established by the Coordinated Organizations which was to be used "as an orientation". It ordered the ESO to recalculate the adjustment of salary for

its staff in accordance with Article R IV 1.01 of the Staff Regulations and in the light of that judgment.

2. Having noted that, at its meeting of 21 and 22 June 1999, the Council of the ESO had taken no steps to execute the judgment, the complainants filed an application for execution on 2 August 1999. Since then, following discussions between the Observatory and staff representatives which produced no positive results, the ESO has indicated in its reply that the Council decided on 23 September 1999 to maintain the 0.7 per cent adjustment rate. In their rejoinder the complainants submit that that decision fails to execute Judgment 1821 and press their initial claims to the Tribunal to order the Observatory to pay the amounts due under the judgment.

3. To ascertain the scope of the complaint, it is necessary to recall the provisions of Article R IV 1.01 of the Staff Regulations as amended in 1995:

> "When reviewing remuneration and allowances, the Council shall use as an orientation an index which shall correspond to the adjustment rate calculated according to the salary adjustment procedure of the Coordinated Organizations with respect to adjustments of the basic salary scales of the Coordinated Organizations in Germany.
>
> When assessing whether or to which extent this index shall be applied as the actual salary increase, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organizations and in the member states.
>
> The basic salary scales and the allowances for international staff in Germany and Chile shall be approved by the Council.
>
> * The remuneration and allowances for members of the personnel at duty stations outside Germany shall be adjusted by applying a cost of living differential in order to obtain equal purchasing power using Munich as lead town.
>
> *) Applicable as of June 8, 1995"

4. After recalling the principles, established in the case law, governing the limits on the discretion of international organisations to set adjustments in staff pay, the Tribunal held in Judgment 1821 that the ESO had failed to give a satisfactory explanation, either before the Joint

Advisory Appeals Board or before the Tribunal, of what factors were involved in its decision. Though it asserted, for example, that ESO salaries "should be at a level which is compatible with the German high-tech industries", there was not one iota of evidence before the Tribunal to demonstrate that salaries in that sector were actually compared. Nor was there any evidence that the Council attempted to take account of "relevant criteria" as required by Article R IV 1.01. Since the impugned decision was not based on any method that took account of relevant criteria, the Tribunal found the Observatory to be in breach both of the provisions of Article R IV 1.01 and of the general principles of international civil service law.

5. The complainants state in their brief – and the defendant does not demur – that the body competent to set salary scales is the ESO Council. To their knowledge, they say, no decision had been taken when they filed their application for execution, and in theory the Council was not due to meet before December 1999. In their rejoinder they expressed their surprise to learn from the defendant's reply, registered on 8 October 1999, that a decision had been taken on 23 September 1999 of which they knew nothing although there had been regular meetings between staff representatives and representatives of the Council, the Finance Committee and the Director General. They express "serious doubts" as to the date if not the very existence of the Council's decision and ask the Observatory to produce in its surrejoinder the decision and a statement of the reasons for it.

6. In its surrejoinder the Observatory refutes those arguments and says that it produced the decision and the reasons for it in section III of its reply. It submits to the Tribunal a document sent to the Council for information, bearing the reference ESO/Cou-709 conf., and dated 25 October 1999, to which is attached the "Council decision related to the Salary Adjustment 1996 – taken in the written procedure September 23, 1999". The decision sets out reasons which are a reproduction of section III of its reply; they even contain a number reference to paragraphs, which appeared in the reply submitted to the Tribunal before

the Observatory had corrected by a fax of 8 November what it describes as a typing error.

7. The Tribunal observes that at all events the circumstances in which the document was adopted remain unclear. The Observatory says that the Administration had submitted in writing a draft of the decision to Council members "in accordance with the usual and acknowledged practice (Judgment No. 1812, *in re* Argos No. 2 and others, under 4, fourth paragraph)". However, that judgment makes no allusion to any such practice. On the contrary, it states in the context of the execution of a judgment quashing a decision on pay adjustment in another organisation, that "the Council obviously had to meet" and that the Administration quite lawfully waited for the next meeting of the Council before putting the matter to it for a decision.

8. The ESO adds that on 23 September 1999 it was "in possession of the Council's written comments and the requests to amend the draft decision", which appears to imply that the draft had not yet become a decision. The Tribunal has no knowledge of what amendments were submitted or adopted, or of the procedure whereby they were adopted or rejected. The only information from the ESO is that "the final text of the decision was approved by the Chairman of the Council and forwarded to the Council members as part of a Council document dated 25 October 1999". A serious doubt therefore exists as to the process whereby the text was drafted, put to the vote and adopted, and, as matters stand, the Tribunal is not in a position to ascertain the lawfulness of the decision which is supposed to ensure execution of its judgment.

9. In these circumstances, the Tribunal has decided to defer ruling on the merits and, pending such ruling, orders the Observatory to submit, within thirty days following notification of this judgment, a brief giving an account of the circumstances in which the decision bearing the date 23 September 1999 was adopted and approved, and providing all relevant information on the procedure whereby the matter was put to the members of the Council, the procedure for the consideration of the amendments and the basis in law for the written procedure whereby the decision was taken.

10. The complainants shall submit their observations on the Observatory's brief within thirty days following receipt thereof and the ESO may submit a further brief within fifteen days of receipt of those observations.

DECISION

For the above reasons,

The Tribunal orders further submissions in accordance with 9 and 10 above.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

EIGHTY-EIGHTH SESSION

***In re* Mella Silva** **Judgment 1909**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Sergio Mella Silva against the European Southern Observatory (ESO) on 27 January 1999, the Observatory's reply of 10 May 1999 and the complainant's waiver of his right to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chilean born in 1959, joined the ESO in September 1988 as an electrician on a three-year contract. He worked as a member of the ESO's local staff in Chile at the astronomic observatory at La Silla. On 17 July 1991 his contract was extended until 12 September 1994 and later for another two years until 12 September 1996. In July 1996 he became a Local Staff Association representative.

In a memorandum assessing his services dated 16 July 1996, the complainant's supervisors expressed concern over the poor quality of his relations with colleagues which resulted in work problems. On 29 July 1996 he was offered a one-year extension of contract until 12 September 1997, based on a proposal of his supervisors, in order to allow him time to improve his interpersonal skills. The complainant accepted that extension on 7 August 1996 reserving his "right to request clarifications" of the comments made by his supervisors.

The version then in force of Article LS II 1.13 of the Regulations for ESO Local Staff in Chile limited the period of fixed-term contracts for such staff to "a maximum total period" of nine years, at which point "the Director General will grant an indefinite contract, or the contract will be terminated". The complainant was informed by a letter of 5 August 1997 from the Head of Personnel that he would not be offered an indefinite contract and his appointment would end on 12 September. On 25 August he filed an appeal against this decision with the Director of the ESO in Chile. In a letter dated 22 September the Director informed the complainant that his appeal was rejected. On 7 October 1997 the complainant appealed to the Director General against the decision of the Director in Chile. The appeal was examined by the Local Staff Joint Advisory Appeals Board. The Board, finding procedural errors, recommended that the Director General "negotiate ... extraordinary compensation" with the complainant. It also considered an earlier internal appeal, filed by the complainant on 25 September 1996, in which he requested that the memorandum of 16 July 1996 from his supervisors be removed from his personal file.

In a letter of 15 December 1998 from the Head of Administration the complainant was informed that the Director General upheld his earlier decisions. The letter further stated that the ESO "would be prepared, however, to examine together with [the complainant] possibilities to reach a final and amicable settlement". Since the parties were unable to do so the complainant filed the present complaint with the Tribunal.

B. The complainant pleads breach of his union rights. The decision not to renew his contract after nine years with the ESO was linked to his position as a staff representative. He argues that as a Local Staff Association representative he enjoyed immunity in that his position in the Association "cannot affect his professional career". Certain procedural safeguards provided for by the ESO rules, as well as Chilean labour law, should have been respected prior to any decision to dismiss him.

As the Local Staff Joint Advisory Appeals Board concluded in its report of July 1998, the "Conflicts and Appeals Board" should have been convened prior to any decision to end his contract. Had this procedure been followed, the Board reasoned, it would have provided the Contract Advisory Committee with more information on which to base its decision. The Board concluded that "an evaluation allowing the extension of a contract just for a period of one year, [after] eight years of service, is virtually a punishment".

The complainant makes three claims for relief. First, he requests that the decision in the letter of 15 December 1998 be quashed, that he be reinstated and that his salary be paid to him as from 12 September 1997 up to the date of reinstatement. Subsidiarily, if reinstatement is not possible, he requests compensation for unjustified dismissal equal to five times his total gross remuneration from 12 March to 12 September 1997, plus interest at 12 per cent a year from the date on which he lodged this complaint.

Secondly, and also subsidiarily, he asks that the ESO should pay him a termination indemnity based on his whole remuneration including the organisation's contribution to the social security scheme ("*asignación previsional*").

Thirdly, he claims an award of costs against ESO as provided for in the Local Staff Regulations.

C. The ESO objects to the receivability of the complainant's second claim requesting a termination indemnity. It contends that this claim is not receivable by the Tribunal as it is an entirely new one that was not raised in the internal appeal procedure. Besides the complainant received such an indemnity on 4 September 1997.

Concerning the complainant's other claims, the ESO submits that these are not well founded in law. In July 1996 the ESO offered the complainant a one-year extension to enable him to demonstrate improvement in his relations with colleagues. The ESO cites the minutes of the Contract Advisory Committee dated 24 April 1997 in which the complainant's contract was discussed. After considering his attitude and performance and the fact that in the future a reduced number of electricians would be needed at La Silla, it was decided not to offer him an indefinite contract. Neither the complainant's direct supervisor nor the head of the competent division recommended an indefinite contract.

The ESO denies that the impugned decision was related to the complainant's position as a staff representative. While as an elected representative he enjoyed some immunity, his position as set out in Article VII 1.05 of the Combined Staff Rules does not entitle him to the protection that he claims. The defendant asserts that termination of the complainant's employment was based on the decision not to offer him an indefinite contract following the expiry of the maximum allowable period for fixed-term contracts. As termination of employment for this reason is not mentioned in Article VII 1.05, the Director General was under no obligation to consult the "Conflicts and Appeals Board" (by which the Observatory assumes the complainant means the Joint Advisory Appeals Board) prior to terminating his employment.

The ESO also points out that, on the recommendation of the Appeals Board, it attempted to negotiate an amicable settlement. These negotiations failed due to the excessive financial demands of the complainant.

CONSIDERATIONS

1. The complainant was employed as an electrician at the ESO's astronomic observatory at La Silla from 13 September 1988 under four consecutive fixed-term contracts, being two three-year contracts, one two-year contract and a final one-year contract which expired on 12 September 1997. This was the maximum period during which he could be granted fixed-term contracts under Article LS II 1.13 of the Regulations for Local Staff in Chile before an indefinite contract was offered or his contract was terminated. The letter dated 29 July 1996 offering him the final one-year extension reflected the views of his supervisors. In a memorandum appraising his services of 16 July 1996, they had expressed concern about the bad quality of his relations with the personnel of other departments and the resulting problems.

2. On 25 September 1996 the complainant appealed to the Director of the ESO in Chile to withdraw the memorandum of 16 July 1996 from his personal file.

3. The Contract Advisory Committee met on 24 April 1997 to consider whether the complainant should be granted an indefinite contract in accordance with Article LS II 1.13. The complainant's direct supervisor and competent head of division did not support the granting of such a contract. The Committee considered the complainant's attitude and performance and the reduced number of permanent positions that would be available for electricians in the future. It did not recommend granting an indefinite contract.

4. The complainant was informed by a letter of 5 August 1997 that his contract would not be renewed or extended. He appealed to the Director of the ESO in Chile who rejected the appeal. He then filed a further appeal with the Director General under Article VI 1.07 of the Local Staff Regulations seeking the quashing of the decision to put an end to his contract.

5. The Director General consulted the Local Staff Joint Advisory Appeals Board which considered the two complaints, one regarding the removal of the memorandum of 16 July 1996 from his personal file and the other relating to the decision not to renew his contract.

6. The Board did not recommend the removal of the memorandum but did recommend that:

> "Due to the fact that the established instances were not exhausted and that we found procedural errors, we recommend [that] the Director General ... negotiate an extraordinary compensation with [the complainant]."

7. By a letter dated 15 December 1998 the complainant was informed of the Director General's decision to maintain the two decisions. The ESO, however, did offer to examine the possibility of reaching an amicable settlement, but this did not prove possible.

8. The complainant has lodged the present complaint against the decision of 15 December 1998 claiming the quashing of the decision not to renew his contract and his reinstatement with salary from 12 September 1997; alternatively, compensation for unjustified dismissal equivalent to five times his total gross remuneration from 12 March to 12 September 1997 with interest at 12 per cent from the date of his complaint. He also claims to be entitled to the ordinary end-of-service indemnity based on his whole remuneration, including the ESO's contribution to the cost of social security ("*asignación previsional*"). He does not claim any relief in respect of the decision not to remove the memorandum of 16 July 1996 from his file.

9. The complainant, who was a local staff representative from 16 July 1996, claims that there is a "union immunities" principle and that the ESO put an end to his contract without having first convened the "Conflicts and Appeals Board". He points to the coincidence between his election as a staff representative and the notification of extension for one year only. He said the "Conflicts and Appeals Board" should have been convened before the decision not to renew his contract was taken.

10. The Observatory objects to the claim for payment of termination indemnities as being a new claim which was not raised in the internal appeal.

11. Since the complainant has not exhausted the means of internal appeal in accordance with Article VII of the Tribunal's Statute, he cannot pursue this claim before the Tribunal.

12. The ESO submits that at the time of the decision of 5 August 1997 not to renew the complainant's contract the Local Staff Regulations then in force did not contain provisions protecting members of the Local Staff Association. However, as from 1976 the ESO applied the provisions of the rules for international staff. As from 1 July 1991 the relevant rule was contained in Article VII 1.05 of the Combined Staff Rules (corresponding to former article R VII 1.06). This provides that the tenure of office in a staff association shall not affect an elected officer's career

and that before any official is dismissed for specified reasons of unsuitability or owing to the suppression of post or a reduction in staff, the Director General shall consult the Joint Advisory Appeals Board.

13. The Observatory points out that the immunity conferred did not require the Director General to consult the Joint Advisory Appeals Board prior to a decision not to extend or renew the complainant's contract. The complainant was not dismissed for any of the reasons specified in Article VII 1.05. Also the relevant rules do not provide for a "Conflicts and Appeals Board"; the ESO assumes that the complainant means the Joint Advisory Appeals Board.

14. ESO submits that the Director General complied with the rules by consulting the Joint Advisory Appeals Board before making a final decision on the internal appeal.

15. The Tribunal is satisfied that, in those circumstances, the Director General correctly applied the rules and there was no procedural flaw.

16. There is no evidence to suggest that the decision not to renew the complainant's contract was in any way connected to, or influenced by, the fact that he was a staff representative. The Contract Advisory Committee was consulted and did not advise granting an indefinite contract. The Director General had valid reasons not to grant such a contract.

17. The Tribunal accepts the submissions of the Observatory. Accordingly, the complaint fails.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Créchet (No. 5)** **Judgment 1910**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 1 February 1999 and corrected on 7 April, the EPO's reply of 25 June, the complainant's rejoinder of 11 August and the Organisation's surrejoinder of 15 September 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the European Patent Office, the EPO's secretariat, is set out under A in Judgments 890 delivered on 30 June 1988 and 1667 delivered on 10 July 1997, in which the Tribunal ruled on his first and second complaints, and in Judgment 1879 delivered on 8 July 1999 in which it ruled on his third and fourth complaints. He was sent on mission as a liaison officer at grade A3 between the Office and the Portuguese National Industrial Property Institute in Lisbon from 1 May 1992 to 31 December 1995.

In a communication to staff dated 27 June 1997 the Personnel Office published a list of Directorate-General 1 staff who were to be promoted. The complainant was not on it. By a letter of 21 August he asked the President of the Office to add his name to the list. By a letter of

2 September the acting Director of Personnel rejected his request on the President's behalf. By a letter of 8 September to the President the complainant filed an appeal against the rejection. In a letter of 10 October 1997 the Director of Personnel Development informed the complainant that the President upheld his decision and had referred the case to the Appeals Committee. In its report of 7 August 1998 the Committee concluded that the complainant did not qualify for promotion and recommended rejecting the appeal. By a letter of 27 August 1998, the impugned decision, the Director of Personnel Development told the complainant that the President had decided to endorse that recommendation.

B. The complainant points out that the Promotion Board considered his case despite the fact that his performance reports for 1992-93 and 1994-95 had not been finalised within one year as required by communiqué 206 of 14 February 1992.

In considering his request for promotion the President did not take into account the successful outcome of his liaison work in Portugal which took place in "objectively difficult circumstances". He thereby disregarded certain relevant documents such as the EPO *Gazette* of 13 May 1991, the letter of 5 October 1995 from the Principal Director in charge of information on patents, and Judgment 1667 (*in re* Créchet No. 2).

He asks the Tribunal to quash the President's decision of 27 August 1998, to send the case back to the Organisation for a new decision on his promotion and to award him 1,000 German marks in costs.

C. In its reply the Organisation recalls that precedent allows the Tribunal only a limited power of review over discretionary administrative decisions such as those concerning promotion. In this case none of the conditions for quashing such a decision was met.

The general guidelines on reporting appended to communiqué 206 affected only indirectly the decision not to promote the complainant. What needs to be established is whether the criteria for promotion set in the "Note from the President to the Chairmen of the Promotion Boards" for 1996, which remained in force in 1997, were met or not. In fact they were not: the complainant had only fourteen years' experience instead of the requisite nineteen to twenty-three years, and had not yet reached the age of forty-four as the Note required. The fact that his performance reports for 1992-93 and 1994-95 had not been finalised when the Board was convened did not prevent it from coming to a decision about him and did not adversely affect him.

The EPO recalls that in Judgment 1667 under 6 the Tribunal recognised that "there was no direct promise as to what the decision would be" regarding promotion since such a "promise would have been untoward and presumably incompatible with any properly strict observance of the Service Regulations".

The complainant's reference to the "objectively difficult circumstances" of his mission is immaterial, the matter having already been dealt with in his third and fourth complaints.

D. In his rejoinder the complainant points out that, according to the President's Note, the Promotion Board may draw the President's attention to special cases "even where the usual requirements are not fully met" .

The Administration "belittled" what he had accomplished in Portugal. He feels that he has been "mistreated". He would have done better to stay in The Hague where he would have been certain of promotion.

E. In its surrejoinder the Organisation presses its pleas. Before reaching a conclusion the Promotion Board did take account of the four years he spent in Portugal. There is nothing wrong with the recommendation it made, since the Board enjoys wide discretionary authority in such matters.

CONSIDERATIONS

1. The complainant's career and the facts at the origin of this case are summed up in Judgments 890, 1667 and 1879 on his four earlier complaints. Following an announcement in the EPO *Gazette* the complainant was chosen to serve as a liaison officer in Lisbon with the Portuguese authorities, more precisely with the Portuguese National Industrial Property Institute. He held that post from 1 May 1992 to

31 December 1995 when he was reassigned to Directorate-General 1 as an examiner at the same grade, A3.

The announcement in the *Gazette* of 13 May 1991 calling for applications for the Lisbon post said that "for career advancement special account [would] be taken of this experience, in the light of the liaison officer's contribution to the success of the mission". At the end of his stay in Lisbon the complainant inquired about the advancement he expected. By a letter of 5 October 1995 he was told that the Promotion Boards would "certainly take account" of the experience he had gained while on mission. Another letter of 5 October 1995 confirmed: "your performance as liaison officer will be recorded in your staff report which, as you know, can affect the advancement of your career". In a letter of 12 December 1995 he was further told, on the President's behalf, that his performance while on mission would be reflected in his staff report which would duly be taken into account for the advancement of his career.

Relying on those statements the complainant asked to be promoted independently of any performance appraisal and usual procedure for promotion. In Judgment 1667 (*in re* Créchet No. 2) the Tribunal upheld a decision rejecting that claim since it found that the announcement in the *Gazette* contained no such promise. However, it found that the reasonable construction to be put on the announcement was that:

> "... success in liaison work should serve the advancement of the employee's career, first in the evaluation of his performance and then in assessing his qualifications for promotion or for appointment to some more desirable post ..."

It concluded then that:

> "the text of the announcement gave the employee a limited assurance that a successful mission as liaison officer would be taken into account as a point in his favour whenever a decision was to be taken on promotion or on appointment ..."

That limited assurance, therefore, afforded no basis for claiming an appointment independently of any evaluation and promotion procedure.

Subsequently, in the procedure that led to the present complaint, the complainant asked to be put on a promotion list submitted to the President. That claim was rejected under the guidelines on promotion. Although his performance reports refer to his work as a liaison officer, neither they nor the decision rejecting his claim show that at the time of the decision on his promotion, account was taken of the "limited assurance" recognised by Judgment 1667 that "a successful [mission] as liaison officer would be taken into account as a point in his favour".

2. The complainant bases his claim on the assurance given in the *Gazette* announcement.

The Organisation rebuts his claim on the grounds that he does not qualify for promotion under the "Note from the President to the Chairmen of the Promotion Boards". It submits that Judgment 1667 confers no rights on him. Besides, his work in Portugal was reflected in his reports and was taken into account in the decision rejecting his claim to promotion.

3. Contrary to what the EPO seems to assert in its written submissions, Judgment 1667 recognises that the text of the announcement gave a guarantee, albeit a limited one, entailing an obligation for the Office to take account of a successful outcome of his mission as liaison officer "as a point in his favour" whenever a decision was to be taken on promotion or appointment.

The Tribunal and the parties must abide by the findings of that judgment.

It should be noted that the limited assurance given by the EPO induced the complainant to apply for the post of liaison officer. The post demanded considerable investment on his part: it involved new duties, a move to a relatively distant country and the study of a new language *ab initio*. It would, therefore, have been natural to attach some importance to the additional effort required of the complainant if it proved successful.

However, it must be inferred from the impugned decision and the EPO's explanations that in the evaluation of his performance and then in the decision on promotion, account was not taken of successful work as liaison officer as a point in his favour over and above the general criteria for promotion set in the President's Note.

The report of the Appeals Committee and the EPO's reply and surrejoinder to this complaint state that the complainant did not fulfil two of the criteria set in the Note for the award of a promotion to grade A3 or A4, as he had not been given the rating "very good" for three successive reporting periods and had not yet reached the age of forty-four at the material time.

It should be noted that the text of the Note allowed the Promotion Boards – and hence the President – to derogate from the usual requirements in order to take account of special cases. Therefore, it was possible, since the complainant's was a special case, to examine whether, in the context of an overall evaluation taking account of success in liaison work, he deserved the promotion he sought.

The Organisation's failure to carry out such an examination deprives its decision of a legal basis. The decision must, therefore, be set aside. However, the Tribunal will not substitute its own assessment for that of the Organisation; it must, therefore, send the case back to the President for a new decision, after further examination if necessary. In the context of the overall evaluation the share to be attributed to success in the complainant's liaison work in Portugal should not be insignificant in view of the considerable additional effort required of him.

Since his case succeeds, the complainant is entitled to costs.

DECISION

For the above reasons,

1. The impugned decision is set aside and the case is sent back to the EPO for the President to take a new decision in accordance with 3 above.
2. The EPO shall pay the complainant 1,000 German marks in costs.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Ansorge (No. 3)**

Judgment 1911

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Wolfgang Richard Ansorge against the European Southern Observatory (ESO) on 17 November 1998 and corrected on 16 February 1999, the ESO's reply of 18 May, the complainant's rejoinder of 25 August and the Observatory's surrejoinder of 18 October 1999;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to the complainant's case are set out under A in Judgments 1739 and 1862 in which the Tribunal ruled on his first and second complaints.

The complainant held the post of product assurance manager at Garching in Germany. On 19 August 1998 the Head of Administration wrote to him on the Director General's behalf. In that letter, which is the impugned decision, he referred to a letter sent to the complainant on 21 November 1996 and confirmed that his contract would not be extended or renewed upon its expiry on 30 April 1999.

B. Citing the case law the complainant puts forward several pleas. The first is that the ESO was in breach of its obligation to state the reasons for an administrative decision adversely affecting a staff member. In his letter of 19 August 1998 the Head of Administration merely referred to a letter of 21 November 1996 in which the Head of Personnel informed the complainant that he would not be given an indefinite contract and that his current contract would probably not be renewed beyond a period of two-and-a-half years because by then he would have finished the work for which he had been recruited.

The complainant asserts that an organisation has a duty to honour "legitimate hopes" that it has raised for the renewal of a staff member's contract. He contends that the duties of product assurance manager are not due to end until 2006 as they are essential to the continuation of the Very Large Telescope (VLT) project. Citing two notices of vacancy for posts related to his duties, published on 22 March 1998 and 2 January 1999, he seeks to show that his duties were necessary beyond 30 April 1999. He further observes that a "Global Project Plan" concerning the construction of a sub-system of the VLT, dated 28 October 1998 and published by his supervisor, indicates that product assurance management has been assigned to another official.

At no time did the ESO consider whether there was any other work he could do in the Observatory's interests. Therefore, it failed in its duty to give him preference for reassignment if a suitable job was available.

He also accuses the Observatory of abuse of authority: the only possible explanation for its refusal to renew his contract is that it wanted to "get rid of him". The ESO has not acted in its own interests, since, in order to replace him, it will have to recruit two people with "less experience and hence less rigour". It has, therefore, failed in its duty to avoid causing him unnecessary and undue injury.

Lastly, by deciding unlawfully not to renew his contract seven years before his retirement, the ESO has caused him material and moral injury "of extreme gravity", since he will have difficulty in finding another job.

He seeks the quashing of the decision of 19 August 1998 and all consequent redress. He claims costs.

C. In its reply the Observatory points out that the complainant did not file an internal appeal.

It denies wanting to get rid of him. The complainant has misread the publication of 28 October 1998. The VLT sub-system requires only eighty days' work by a product assurance manager for the period 1999-2001. It would make no sense to take someone on for so small an amount of work. The duties involved will be entrusted to other members of staff. Besides, the complainant's post was temporary and was necessary only for the instrumentation of the VLT project. Now that that operation has been completed, the post has become redundant.

The reason for the impugned decision is stated in the letter of 21 November 1996 informing the complainant that his duties would end in 1999. After consideration, the Director General concluded that there had been no change in the situation and so his contract should not be renewed.

The complainant could be assigned to neither of the two posts he mentions: one was for a local member of staff and the other did not match his profile. The Director General did explore the possibilities of reassigning him but no suitable post was available.

The complainant was not treated unjustly. The ESO regrets the difficulty he has encountered in finding another job but asserts, citing the case law, that it formed part of the risk inherent in "the accepted practice of international organisations to employ staff on the basis of fixed-term contracts".

D. In his rejoinder the complainant states that in Judgment 1739 the Tribunal stressed that the letter of 21 November 1996 said only that "his post was not an indefinite one and few permanent appointments were to be had anyway".

He asserts that the ESO is inconsistent: by excluding a product assurance manager from only one of the VLT sub-systems, it has admitted that the duties of such a manager are necessary to the continuation of the other components of that project.

The redistribution of his former duties among other members of staff is impossible from a technical standpoint as it would imply halting the development of the VLT project. Besides, it is "likely seriously to endanger the safety" of those working on the site.

The complainant maintains that the post of project assurance manager is linked to the completion of the VLT project, since the fact that he would not reach retirement age before completion of the project was a "decisive element" in his being selected for the post. He adds that the ESO made no serious attempt to reassign him.

The Observatory did not reply to his plea of abuse of authority. Furthermore, it was "very obviously biassed" against him: as chairman of the Staff Committee he was "implicitly" the target of some "harsh" comments made by the Director General at a briefing on 11 June 1997.

E. In its surrejoinder the Observatory points out that in Judgment 1862 the Tribunal found his arguments concerning the abuse of authority to be unfounded.

It is not for the complainant to say that his post is indispensable. Only the Director General and the ESO Council have the authority to identify posts necessary to the fulfilment of the Observatory's objectives.

CONSIDERATIONS

1. The working relations between the complainant and the ESO gave rise to Judgments 1739 and 1862, to which the Tribunal refers.

The complainant joined the ESO on 1 May 1991 under a fixed-term contract for three years. He was assigned to the Very Large Telescope (VLT) project as product assurance manager. On 19 November 1993 his contract was renewed for another three years until 30 April 1997.

On 2 February 1995 the staff of the ESO were informed that, over and above his other duties, the complainant would be in charge of safety and security.

By a letter of 30 October 1996 the Head of Personnel offered the complainant a two-year extension of his contract, until 30 April 1999.

On 21 November 1996 the Head of Personnel sent him a further letter, identical in content to that of 30 October but for the addition that he would discuss with him in due course his duties as safety manager.

On 16 January 1997 the complainant signed the offer of a two-year extension adding the words "without prejudice to my rights" and on the same day filed a notice of appeal with the Director General against the refusal of an indefinite contract. He impugned the Director General's refusal to reverse that decision in a complaint which the Tribunal ruled on in Judgment 1739.

On 3 April 1997 the ESO staff were informed that the Head of Administration was to replace the complainant as safety manager. The complainant appealed against that decision. The Director General rejected the appeal and upheld the decision. The complainant challenged it in a second complaint on which the Tribunal ruled in Judgment 1862.

2. By a letter of 19 August 1998, notified on 7 September, the Head of Administration informed the complainant that his appointment would not be extended or renewed and that he was to treat the letter as official notice under Article R II 6.03 of the Staff Regulations. That is the decision he is now impugning.

3. The complainant seeks the quashing of the Director General's decision as notified by the Head of Administration's letter of 19 August 1998, with all consequent redress. He also claims costs.

4. He submits that the impugned decision is unlawful. First, the Observatory was in breach of its obligation to state the reasons for an administrative decision adversely affecting a staff member, particularly one terminating an appointment. Secondly, it disregarded the principle that a staff member on a fixed-term contract has a rightful expectation to renewal, thereby failing in its obligation to allow staff preference for reassignment if a suitable job is available. Thirdly, the decision shows abuse of authority. Fourthly, the ESO failed in its duty not to impair the dignity and good name of staff and not to cause them unnecessary and undue injury.

5. The complainant contends that the ESO failed in its obligation to state the reasons for an injurious administrative decision, particularly one terminating an appointment. He submits that the Observatory failed to substantiate the injurious decision of 19 August 1998 not to renew his fixed-term contract.

In rebuttal, the ESO argues that it did substantiate the decision which is impugned: its earlier decision of 21 November 1996 explained that the complainant's duties as product assurance manager would end in 1999 and that his contract would not be extended beyond 30 April 1999. That situation remained unchanged.

It adds that the Director General reconsidered the situation before deciding not to extend or renew the complainant's contract.

The Tribunal notes that nothing in the evidence bears out the ESO's allegations. In particular, the Observatory adduces no evidence in support of its assertion that the Director General reconsidered the situation.

The impugned decision of 19 August 1998 refers to the letter of 21 November 1996. That letter had explained that the complainant's duties as product assurance manager for the VLT project would not be needed after the expiry of his two-year contract, and its main purpose was to inform him of the decision not to give him an indefinite contract since his post was not a permanent one and only a limited number of indefinite contracts were available. The purpose of the impugned decision was also to notify the non-renewal of the contract expiring on 30 April 1999, in accordance with Article R II 6.03 of the Staff Regulations.

6. The complainant rightly observes that "it is difficult to see how a letter predating the impugned decision by two years can account for it, unless that decision had already been taken two years previously". The Tribunal endorses that observation and considers that, even though the letter of 21 November 1996 stated that the complainant's contract would not be extended beyond 30 April 1999, the reference to that letter cannot be interpreted as the sole reason for the decision of 19 August 1998 not to

renew his contract. It is a general principle of the international civil service that there must be a valid reason for any decision not to renew a fixed-term contract and that the reason must be given to the staff member (see Judgment 1154, *in re* Bluske).

An official whose fixed-term contract is reaching expiry must be informed in a timely manner of the real reasons for the decision not to renew it.

7. In this case a mere reference to a letter sent to the complainant nearly two years previously cannot, in the absence of any other indication as to the real reasons for the decision to be taken, exempt the Observatory from stating the grounds clearly. The more so as the situation would appear to have changed: the ESO admits that a small part of the project was to continue beyond 30 April 1999; and two vacancy notices were published, for the posts of safety engineer and systems engineer. All that warranted a more explicit account from the Director General of why the complainant's contract could not be renewed.

8. Accordingly, it may be concluded that the ESO failed to fulfil its obligation to account for an administrative decision adversely affecting a staff member, in this case the decision not to renew the complainant's fixed-term contract, thereby impairing his dignity and causing him undue and unnecessary injury.

The decision of 19 August 1998 must, therefore, be set aside; the Tribunal need not entertain his pleas concerning abuse of authority and disregard of the principle of legitimate expectation, which, in any event, would have failed given the circumstances of the case.

9. The Tribunal considers that by deciding not to renew his contract the ESO caused the complainant material injury. It also considers that the complainant suffered moral injury warranting redress. It, therefore, awards him 50,000 German marks in compensation for injury under all heads. However, the case will not be sent back to the ESO for reconsideration and

shall be regarded as having been settled fairly and finally by this judgment in accordance with Article VIII of the Statute of the Tribunal.

10. The ESO shall bear the costs, which the Tribunal sets at 20,000 French francs.

DECISION

For the above reasons,

1. The decision of 19 August 1998 is set aside.
2. The Observatory shall pay the complainant 50,000 German marks in compensation for injury under all heads.
3. The Observatory shall pay the complainant 20,000 French francs in costs.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Berthet (No. 2), Lampinen, Leberman and Schechinger**

Judgment 1912

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs Carmen Berthet – her second – Mrs Mervi Johanna Lampinen, Mr Reuben Leberman and Mr Erich Schechinger against the European Molecular Biology Laboratory (EMBL) on 23 June 1997 and corrected on 26 March 1998, EMBL's replies of 2 July, the complainants' rejoinders of 7 August and the Laboratory's surrejoinders of 7 October 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to this dispute are to be found under A and E in Judgment 1798 (*in re* Ashurst and others) delivered on 28 January 1999.

The Coordinating Committee on Remuneration of the Coordinated Organizations[*] recommended a salary adjustment for 1996 of 1.3 per cent in Germany, 1.4 per cent in France, 3.5 per cent in the United Kingdom and 4.3 per cent in Italy. On 17 December 1996 the EMBL Council decided, in accordance with Article R 4 1.01 and Annex R.A.1 of the Staff Regulations as amended on 4 July 1996, that there would be no salary adjustment, for 1996, for staff serving in Germany and France and a 5.0 per cent adjustment for staff in the United Kingdom and Italy. It also decided to set up a working group to review all terms and conditions of employment at the Laboratory and to take account of the latest position in comparable national and international research organisations. The staff was informed of these decisions by the Director-General and the Administrative Director at a meeting on 19 December 1996 and by an undated document entitled "Good News in Heidelberg" which was later circulated throughout the organisation.

The complainants are employees of the Laboratory who serve in Germany. On 14 February 1997 they, and nineteen other staff members, lodged identical appeals with the Director-General through the chairman of the Staff Association. They asked for the quashing of what they considered to be the first individual decision applying the Council's decision of 17 December 1996 – i.e. the pay slips for January 1997, received on 15 January. They also asked, in the event of a denial of their request, to be allowed to appeal directly to the Tribunal, without exhausting the internal means of appeal.

By a letter of 26 March 1997, containing the impugned decision, the Director-General informed the chairman of the Staff Association that the pay slips were "nothing more than an automatic application of Council's decision of 17 December" notified to staff on 19 December 1996. That was the date on which the statutory thirty-day time limit for lodging an appeal started to run, so their appeals of 14 February were time-barred. Besides, they fell short of the requirements of Article R 6 1.04 of the Staff Regulations since they failed to state all the grounds of appeal and were not accompanied by the requisite documentary evidence.

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[*] They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

B. Citing Judgment 1451 (*in re* Hamouda and others) of 6 July 1995, the complainants submit that their complaints are receivable: they impugn, within ninety days as required by Article 7(2) of the Tribunal's Statute, their pay slips as the first individual decisions applying the general decision under challenge. The fact that the Council's decision of 17 December 1996 was specific enough to cause them individual injury and hence to be challenged directly does not mean that their complaints are time-barred. To hold the contrary would be inconsistent with the principle of legal protection. Their appeals are perfectly explicit.

On the merits they contend that the Laboratory took decisions "solely on the basis of budgetary consultations" whereas, according to them, Judgment 1682 (*in re* Argos and others) of 29 January 1998 excluded budgetary considerations from the reasons which may be given for departing from the recommendations of the Coordinated Organizations.

They argue that the amendment to Article R 4 1.01 of the Staff Regulations was in breach of the procedure in Article R 7 1.01 because the Standing Advisory Committee had not been consulted. By taking a standard of reference that is not binding the Council is "discarding the whole idea of adjustment". It has also repealed the ban on downward adjustment.

Besides, the method of adjustment is arbitrary and in breach of "the most elementary good faith" and general principles of international civil service law, such as legal protection and Noblemaire. Mrs Lampinen and Mr Schechinger contend that the Laboratory has also violated the principle of equality of treatment to the detriment of staff serving in Germany.

All the complainants plead breach of their acquired rights in that the impugned decision precludes adjustment of salary to the cost of living and infringes what they call the "right to maintain [their] salary".

They seek the quashing of the Director-General's decision of 26 March 1997 and an award of costs.

C. The Laboratory replies that the complaints are irreceivable because the decision of 17 December 1996 was a final one and the complainants have not impugned it within thirty days following its notification on 19 December. In addition, this decision was not the basis in law of the January 1997 pay slips. Article R 6 1.04 of the Staff Regulations says that appeals must state all grounds of appeal and be accompanied by all documentary evidence. The complainants' appeals did not meet these requirements.

In subsidiary pleas on the merits the Laboratory contends that the amendment to the Staff Regulations adopted by the Council on 4 July 1996 made no change of substance in the text put to the Standing Advisory Committee but simply deleted repetitions. Therefore, there was no need to consult the Committee again. Even the chairman of the Staff Association himself saw no point in its meeting again.

According to the Laboratory, the Tribunal's case law states that an organisation must abide by its own rules, but it is free to set those rules and, if necessary, amend them. Therefore, the Laboratory was not bound to take the system of the Coordinated Organizations as a binding standard of reference.

The purpose of the adjustments decided on in December 1996 was to ensure purchasing power parities between the different duty stations and they were not in breach of good faith. Besides, "some flexibility is needed to take into account changes in the financial and budgetary situation" of the Laboratory. The ban on downward adjustments imposed prior to July 1996 was a temporary measure.

As for the Noblemaire principle, the Laboratory states that "member States appear not to acknowledge any obligation to pay the highest salary scales to international civil servants".

It denies breach of the principle of equal treatment and the complainants' acquired rights - adjustment of salary to the cost of living is not an acquired right.

D. In their rejoinders the complainants submit that, according to the Tribunal's case law, a staff member may, without any risk of being time-barred, wait for an individual decision applying a general decision, even if the latter is challengeable. Their appeals did state all the grounds they were based on.

In their submission, any amendment to be adopted by the Council should have gone to a plenary meeting of the Standing Advisory Committee, and merely getting the opinion of the chairman of the Staff Association was not enough to replace this consultation.

In their view, the purpose of the amendment "was not just to stop rises in pay" but to reduce it by "applying negative indices".

E. In its surrejoinders the Laboratory concedes that the Council's decision of 17 December 1996 could be considered as the basis in law for the January 1997 pay slips. It therefore withdraws its objections to receivability on that point but maintains that there was a breach of Article R 6 1.04.

It asserts that in Judgment 1682 the Tribunal stressed the fact that the Laboratory "may switch to another system or standard of reference". That was exactly what the Laboratory did when it amended the rules in July 1996 so as to "allow greater flexibility as compared to the decisions of the Coordinated Organizations", and the decision of 17 December 1996 was in keeping with the amended rules.

CONSIDERATIONS

1. The complainants are employees of the European Molecular Biology Laboratory who are challenging their pay slips for January 1997. Their arguments are identical, apart from a plea presented by only two of them, alleging a breach of the principle of equality of treatment between staff members serving in Germany and those serving outside Germany. The complaints can thus be joined.

2. The gist of the case is as follows: until 1996, the pay of the Laboratory's staff was ordinarily adjusted every year in accordance with Article R 4 1.01 of the Staff Regulations which provided that: "... the Council [of the Laboratory] shall use as a guide the relevant decisions of the Coordinated Organizations". Following Judgment 1419 (*in re* Meylan

and others) of 1 February 1995, by which the Tribunal had ruled against another organisation for violating an identically worded text, the Council of the Laboratory adopted on 4 July 1996 an amendment to its Staff Regulations, of which Article R 4 1.01 now provides that:

> "Basic salary scales and allowances shall be reviewed and determined in accordance with the decisions taken by Council as laid down in Annex R.A.1."

As for Annex R.A.1, it now reads in part:

> "The Council
>
> - stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;
> - stating that the reference to the relevant decisions of the Coordinated Organisations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;
> - herewith replacing its decision of December 9, 1981,
>
> decides that:
>
> 1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organisations with respect to adjustment of the basic salary scales of the Coordinated Organisations in Germany.
> 2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organisation and in the Member States.
> 3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organisations.
> 4. The basic salary scales and the allowances for staff shall require the approval of a formal Council resolution."

3. Following this amendment, certain Laboratory employees challenged their pay slips for July 1996, but in ruling on the dispute the Tribunal took the view that the complainants could not validly invoke, in support of their requests, the unlawfulness of the new rules since they had not yet been applied (see Judgment 1798, *in re* Ashurst and others, of 28 January 1999).

4. On 17 December 1996, the Council of the Laboratory, applying the amended Regulations for the first time, decided not to follow the

recommendations of the Coordinated Organizations for 1996, which were 1.3 per cent in Germany, 1.4 per cent in France, 3.5 per cent in the United Kingdom and 4.3 per cent in Italy. The salary adjustment was fixed at zero per cent for Germany and France and at 5.0 per cent for Italy and the United Kingdom in order, according to the defendant organisation, to bring the purchasing power of the staff members based in the latter countries closer to that of the staff members based in Germany. The complainants, who had received no adjustment for 1996, addressed appeals against the pay slips of January 1997 to the Director-General, who rejected them as irreceivable by a decision of 26 March 1997 notified to the chairman of the Staff Association. It is this decision which the complainants now impugn.

5. The defendant organisation has, on two grounds, contested the receivability of the four complaints: on the one hand, it argues that the complainants are, in fact, challenging not their pay slips of January 1997 but the Council's decision of 17 December 1996, and did not do so within the required time limits; on the other hand, it takes the view that their appeals fall short of the requirements of Article R 6 1.04 of the Staff Regulations.

6. On the first point, the Laboratory states in its surrejoinder that it "will not insist on the objection that it had previously lodged" and appears therefore to withdraw its objection to receivability which is indeed untenable. The complainants are certainly entitled, on the occasion of appeals against individual decisions that concern them directly, to plead the unlawfulness of the regulation which underpins these individual decisions. The Council's decision of 17 December 1996 regulated, in principle, only the salary adjustment for 1996, but in view of the date of the decision it follows that it was the pay slips for January 1997 which applied for the first time the absence of adjustment decided upon.

7. On the second point, however, the Laboratory maintains that the complainants did not submit their appeals in accordance with the requirements of Section 6.1 of the Staff Regulations, which provides that internal appeals "shall state all grounds of appeal put forward by the

appellant and shall be accompanied by all documentary evidence in support thereof". It is quite true that the appeals, signed on 14 February 1997 by 23 staff members and transmitted to the Director-General by the chairman of the Staff Association, lacked precision in respect of the legal arguments adduced to criticise the impugned decisions. They evoked, however, in addition to "errors of fact, errors of law and clearly false conclusions" - which is, indeed, very vague - a breach of the principle of good faith and of their acquired rights, making an express reference to the Tribunal's case law, and this definitely constituted sufficient motivation to satisfy the requirements of Section 6.1 of the Regulations. It is thus incorrect to maintain that the complainants have not exhausted the internal means of redress and that their appeals would thereby be irreceivable.

8. In support of their case, the complainants put forward first of all a procedural plea. According to Article R 7 1.01 of the Staff Regulations: "The Standing Advisory Committee shall advise the Director-General on general questions concerning the personnel ...". Although the Standing Advisory Committee was consulted concerning the draft amendment to Article R 4 1.01 of the Regulations, the administration submitted for the Council's approval two versions of the text: the one that had been submitted to the Standing Advisory Committee and another simplified version that the administration had prepared. It was this second version that was adopted by the Council. The complainants take the view that, in these circumstances, the consultation procedure provided for by Article R 7 1.01 was not followed. This tainted with unlawfulness the deliberations of 4 July 1996 and, consequently, the decision of 17 December 1996 which refuses all salary adjustment for staff members stationed in Germany and France.

9. The Laboratory counters that view with two arguments. While the version of the text adopted by the Council had not been submitted to the Standing Advisory Committee, only editorial corrections had been made to the text that had been submitted and no substantive changes had been made to it. Moreover, a new consultation would not have had any impact on the solution finally adopted, since the staff representatives had, during the consultation of the Committee, expressed their opposition to the

proposed amendments and the chairman of the Staff Association had made it clear that it was not possible to remove that opposition on the grounds of principle and that a further meeting would be useless.

10. On this last point, the Laboratory's objection could not be accepted. The fact that the chairman of the Staff Association has made his position known does not mean that there is no need to consult an official body, made up of representatives of the administration and the staff who are entitled to make their views known quite independently and whose opinions can develop in the course of a discussion.

11. On the other hand, it is true that a further consultation of a body which must give its opinion on a draft text is necessary only if substantial changes are made to the text drafted by the authority having the decision-making power. In the present case, the change made to the text initially submitted for the opinion of the Standing Advisory Committee had simply the effect of avoiding a repetition between the Regulation and Annex R.A.1, while maintaining their combined effect. There was thus no need to hold a further consultation to consider a draft text that had strictly the same meaning as that which had been submitted to the Committee.

12. On the merits the complainants maintain that the system adopted to fix pay as from 1996 is contrary to the general principles of law governing the matter and is a breach of their acquired rights.

In the first place, they take the view that the system introduced by the Laboratory leaves the door open to complete legal uncertainty and does not make it possible to preserve the principles of objectivity, stability, predictability, transparency, security and preservation of confidence which must characterise the relationships between an organisation and its staff.

13. As indicated in Judgment 1821 (*in re* Allaert and Warmels No. 3):

> "The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:

> (a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.
>
> (b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.
>
> (c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.
>
> (d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6."

14. In fact, although the Tribunal is attached to the principles thus defined and is determined to ensure that they are respected, it has never taken the view that the salary regime of international civil servants must be fixed once and for all. It has stated on numerous occasions that the organisations are entitled to change the standard of reference or the system for fixing the salary of their staff provided that they respect the procedures and forms laid down by their statutory rules (see, for example, Judgment 1419 and, as far as the defendant organisation is concerned, Judgment 1682) and do not, of course, breach the general principles of international civil service law. In the case in question, however, the amendments to Annex R.A.1 of the Staff Regulations of the Laboratory consist in specifying that the index calculated according to the procedure of the Coordinated Organizations shall be used as an "orientation" by the Council when it is reviewing basic salary scales and allowances for staff based in Germany; that, "when assessing whether or to what extent this index will be applied as the actual salary adjustment", the Council shall take into account relevant criteria including "the economic, budgetary and social situation" prevailing in the member States and the organisation; and that the basic salary scales and allowances for staff based outside Germany shall be determined so as to preserve the purchasing power of the persons concerned.

15. Certainly, it is regrettable that the Laboratory did not adopt a more precise methodology of adjustment. The methodologies adopted by international organisations for setting and adjusting the remuneration of the staff, in principle, must enable results to be obtained that are stable, foreseeable and clearly understood, as cited above in Judgment 1821. When the applicable method uses an external index, as does the Laboratory since the modification of its Regulations, not with a view to requiring the competent body to conform automatically to the index, but only as a simple "orientation", which in itself is not a breach of any rights, the staff can only be protected against arbitrariness if the criteria used in deviating from the suggested orientation of the external index are objective, adequate and known to the staff. The new Article R 1.01 of the Regulations, by itself, does not breach these principles, but it must be verified that its application does not impair the guarantees offered to international civil servants.

16. In the present case, the defendant organisation demonstrates that the automatic application of the index resulting from the relevant decisions of the Coordinated Organizations would have led to increased disparity of purchasing power between the staff according to the salary scales applicable to their duty station. The adjustments made for the United Kingdom and Italy ensured the purchasing power parity of the staff stationed in these countries in relation to staff residing in Germany, which was a legitimate objective.

17. Without a doubt, the decision not to apply the 1996 adjustment to staff serving in Germany and France was not taken without budgetary considerations, but the budgetary situation of the organisation and the member States constitutes one of the pertinent elements which, in this case, could be taken into consideration. The complainants have not stated in what way the evaluation of these difficulties was based on wrong factors.

18. It is also necessary that the application of Article R 4 1.01 of the Regulations, in this case, does not breach the recognised right of the staff of international organisations to receive – in the interest of international

civil service itself - a level of remuneration equal to that in countries where, for comparable qualifications, the salaries are the highest. It is only in the event of such a breach that a challenge could justifiably be made. The complainants have not given any indication to the Tribunal that the salary scale for January 1997, as fixed by the Council's decision of 17 December 1996, providing for no pay award for the persons concerned, has had the effect of keeping their salary, without proper motivation, at a level that would be manifestly inadequate. As for the plea concerning the breach of the principle of equality of treatment, invoked by Mrs Lampinen and Mr Schechinger only, based on the fact that the treatment of staff members stationed in Germany is different from that of staff members stationed outside Germany, it cannot be allowed either: the purpose and intended effect of the system applied are, as recalled above, to preserve purchasing power parities between the two categories and here again there is nothing in the complaints to indicate that the pay slips applying the new provisions have entailed genuine discrimination. Lastly, the plea that the new wording of Annex R.A.1 renders it henceforth possible to apply downward adjustments could be examined only if the disputed pay slips embodied such an adjustment and this is not the case.

19. The complainants consider that their acquired rights have not been recognised in the new Regulations: the Laboratory was obliged, in their view, to index their salary to the cost of living at the time when they entered its service and such indexing formed part of their basic and essential conditions of employment, and hence of their acquired rights. However, international civil servants do not have an acquired right - any more than national civil servants - to an automatic indexing of their salaries. As recalled in Judgment 1118 (*in re* Niesing No. 2 and others), the establishing of regulations for the periodic adjustment of salary is within the discretion of the organisations provided that these regulations do not violate the principles of international civil service law and their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between those organisations and their staff members. In the case in question, such an erosion has not been proved and the Tribunal has no reason to conclude

that the salary levels decided upon for the year 1996 jeopardise the basic conditions of employment to the preservation of which the complainants are entitled.

20. It follows from all the foregoing that, contrary to what the defendant organisation maintains, the complaints are receivable, nevertheless they must be dismissed as being without merit.

DECISION

For the above reasons,

The complaints are dismissed.

DISSENTING OPINION BY MR JUSTICE HUGESSEN

1. Over the years the Tribunal has developed a series of rules designed to protect the economic security of international civil servants by enshrining their right to periodic cost of living adjustments to their salaries. This is a right protected by many national legislations but for international civil servants only the Tribunal's case law stands between them and the inevitable erosion of their purchasing power by inflation.

2. These principles were recently restated, but certainly not invented, by the Tribunal in Judgment 1821 (under 7) as follows:

> "(a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.
>
> (b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.
>
> (c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.
>
> (d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid

> reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6."

3. The majority judgment, while paying lip service to these principles in fact sets them at nought and reduces them to mere empty words. It sets its blessing on a staff regulation which leaves the adjustment of salaries to the "sovereign" appreciation of the employer; how can this be described as a "methodology, system or standard"? It is none of them.

4. In Judgment 1821, quoted above, the Tribunal was very critical of a staff regulation drawn up in terms identical to those of the regulations at issue here. It said (under 8):

> "Even if it were possible to dignify the process adopted by the ESO by calling it a methodology for salary adjustment, it obviously fails to produce results that are stable, foreseeable and clearly understood."

5. Likewise, one looks in vain at the regulation here being invoked by the defendant to find any trace of assurance that it will produce results that are "stable, foreseeable and clearly understood". There can be no stability in what is in essence left to the whim of the Laboratory, its foreseeability is a matter of pure guesswork, and it can be understood only in the context of an overriding desire of the Laboratory to save money at the expense of its staff.

6. In the present case the "methodology" chosen purports to rely on an external standard – the index of the Coordinated Organizations. This was the standard previously in use, but the Laboratory seems to think it has made a significant change by substituting the word "orientation" for the word "guide". That is a very dubious proposition, and even if it were accepted one may well ask how an adjustment of zero per cent can be said to have the same orientation as one of 1.3 per cent. It is in any event clear from the case law that the burden of justifying any departure from the chosen standard lies squarely on the shoulders of the organisation, and that such justification must be clear and unambiguous. Again, one looks in vain for anything of the kind in the present case.

7. Cost of living adjustments are not a matter of grace and favour for international civil servants. Adjustments are an essential part of the remuneration structure which allows salaries to keep pace with inflation. Of course the exercise is not, and can never be, purely mechanical: there are almost as many indices for the purpose as there are economists and the task is made particularly difficult for international organisations which have to take account of varying economic conditions in a wide variety of countries and duty stations. But that does not mean that an organisation can simply throw up its hands and resort to arbitrariness. The majority judgment opens the door to just that.

8. The complaints should be allowed, the impugned decisions set aside and the matters referred back to the defendant organisation for reconsideration.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, Mr Julio Barberis, Judge, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JULIO BARBERIS

SEYDOU BA JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

_In re_ Dauvergne, Gemünd, Harper, Lampinen (No. 2), Schechinger (No. 2), Stösser and van der Zandt

Judgment 1913

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr François Dauvergne, Mrs Christine Gemünd, Mr Robert Harper, Mrs Mervi Johanna Lampinen – her second – Mr Erich Schechinger – his second – Mr Günter Stösser and Mr Hans van der Zandt against the European Molecular Biology Laboratory (EMBL) on 11 June 1998 and corrected on 1 September, the EMBL's single reply of 8 December 1998, the complainants' rejoinder of 10 March 1999 and the Laboratory's surrejoinder of 21 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to this dispute are to be found under A in Judgment 1798 (*in re* Ashurst and others) delivered on 28 January 1999.

The Coordinating Committee on Remuneration of the Coordinated Organizations[*] recommended a salary adjustment for 1997 of 1.6 per cent in Germany, 2.8 per cent in France, 3.5 per cent in the United Kingdom and 3.3 per cent in Italy. On 12 December 1997 the EMBL Council, in accordance with Article R 4 1.01 and Annex R.A.1 of the Staff Regulations as amended on 4 July 1996, decided to adjust staff salaries. The recommendations of the Coordinating Committee and the adjustments decided on by the EMBL Council are set out in the following table:

	Coordinated Organizations	EMBL	
		Grades 2 to 8	Grades 9 to 14
Germany	1.6 %	1.5 %	2.3 %
France	2.8 %	0.0 %	3.2 %
United Kingdom	3.5 %	2.9 %	0.0 %
Italy	3.3 %	4.0 %	7.5 %

The complainants are employees of the Laboratory. Owing to their grades and duty stations, their salary adjustments were lower than the adjustments recommended by the Coordinated Organizations. At various dates between 13 and 19 January 1998 they filed identical appeals with the Director-General. They asked for the quashing of what they considered to be the first individual decisions applying the Council's general decision of 12 December 1997 – i.e. the pay slips for July to December 1997, the latter of which was notified to them on 17 December. They also asked, in the event of a denial of their request, to be allowed to appeal directly to the Tribunal, without exhausting the internal means of appeal.

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[*] They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

By letters of 13 and 17 March 1998 – the impugned decisions – the Director-General informed the complainants that in his view their appeals did not comply with the requirements of Article R 6 1.04 of the Staff Regulations since they failed to state all the grounds on which they were based and were not accompanied by the requisite documentary evidence.

B. The complainants submit that the amendment to Article R 4 1.01 of the Staff Regulations was adopted in breach of the procedure in Article R 7 1.01 because the Standing Advisory Committee had not been consulted.

By taking a system of reference which is not binding the Council is "discarding the whole idea of adjustment". It has also repealed the ban on downward adjustments. Besides, the method of adjustment is arbitrary and in breach of "the most elementary good faith" and general principles of international civil service law, such as legal protection, equality of treatment and Noblemaire.

They plead breach of their acquired rights in that the impugned decision precludes adjustment of salary to the cost of living and infringes what they call "their right to maintain [their] salary". They add that this right has been "breached by the Organisation since 1992" and "has in all likelihood exceeded" the threshold beyond which the Tribunal deems that this amounts to an impairment of acquired rights.

They seek the quashing of the Director-General's decisions of 13 and 17 March 1998 and costs.

C. In its reply the Laboratory submits that, in their appeals, the complainants purposely disregarded the requirements of Section 6.1 of the Staff Regulations and that their complaints are therefore irreceivable. It asserts that "any retroactive change in the pay adjustment for 1997" and previous years "would annul both the Council's approval of the [present] terms and conditions of employment" of Laboratory staff and "the standards of reference and purchasing power parities which have now been established" and, hence, the basis for accepting the recommendations of the Coordinated Organizations for pay adjustments in 1998 and 1999.

In subsidiary pleas on the merits the Laboratory refers to its replies in the cases ruled on in Judgment 1798, and Judgment 1912 (*in re* Berthet No. 2 and others) also ruled on this day. It submits that the amendment adopted by the Council on 4 July 1996 made no change of substance in the text put to the Standing Advisory Committee but simply deleted repetitions. Therefore, there was no need to consult the Committee again. Even the chairman of the Staff Association himself saw no point in its meeting again.

According to the Laboratory, the Tribunal's case law states that an organisation must abide by its own rules but it is free to set those rules and, if necessary, amend them. Accordingly, the Laboratory was not bound to take the system of the Coordinated Organizations as a binding standard of reference.

The purpose of the adjustments decided on in December 1997 was to ensure purchasing power parities between the different duty stations and they were not in breach of good faith. Besides, "some flexibility is needed to take into account changes in the financial and budgetary situation of the Organisation". The ban on downward adjustments, imposed prior to July 1996, was a temporary measure.

As for the Noblemaire principle, the Laboratory states that "member States appear not to acknowledge any obligation to pay the highest salary scales to international civil servants".

It denies breach of the principle of equal treatment and of the complainants' acquired rights – adjustment of salary to the cost of living is not an acquired right.

Unlike the Coordinated Organizations, the Laboratory employs most of its staff on the basis of fixed-term appointments and grants them guaranteed annual pay increments of 2 to 3 per cent "over and above any other pay adjustment". Lastly, in Judgment 1682 (*in re* Argos and others) the Tribunal upheld the Laboratory's right to change to another system.

D. In their rejoinder the complainants maintain that their appeals did set out all the grounds they were based on.

On the merits, they refer to the rejoinders of the complainants in the cases ruled on in Judgment 1912. Any amendment to be adopted by the

Council should have gone to a plenary meeting of the Standing Advisory Committee, and merely getting the opinion of the chairman of the Staff Association was not enough to replace this consultation.

In their view, the purpose of the amendment "was not just to stop rises in pay" but to reduce it by "applying negative indices".

They add that the adjustments granted by the Laboratory, set out in the table under A, show that the logic for determining pay adjustments was based on grade rather than on duty station, yet changes in a country's cost of living affect all staff regardless of their grade. By treating some grades better than others the Laboratory has broken the rules of predictability, objectivity and transparency which an organisation must obey. The Laboratory cannot argue that the complaints must fail because the retroactive nature of the adjustments would disrupt the balance of its finances now and for years to come. To accept such an argument would amount to stripping the Tribunal's judgments of all effect.

They contend that the Laboratory is confusing the notions of pay adjustment and pay increase. According to their interpretation, the one aims "to maintain purchasing power" and the other "to increase it". The decision "not to apply a downward adjustment cannot mask the injury sustained".

E. In its surrejoinder the Laboratory maintains its objections to receivability. It denies any discrimination based on grade and points out that the decision on pay adjustment is a complex one and does not only involve cost of living increases. Lastly, it is "perfectly legitimate" for the Laboratory to mention the consequences of retroactive adjustment on salary structure and the financial situation of the Organisation.

CONSIDERATIONS

1. The complainants, all employees of the European Molecular Biology Laboratory (EMBL), are challenging their pay slips for July to December 1997 in that they have been awarded a pay adjustment lower than that which was recommended by the Coordinated Organizations.

Since the complaints, submitted on the same day, raise the same issues and develop an identical argument, the Tribunal joins them.

2. On 4 July 1996, the Council of the Laboratory, modifying the provisions of the Staff Regulations which required that it use the decisions of the Coordinated Organizations as a "guide" for annual pay adjustments to staff salaries, adopted a new version of Article R 4 1.01 of the Staff Regulations, which reads as follows:

> "Basic salary scales and allowances shall be reviewed and determined in accordance with the decisions taken by the Council as laid down in Annex R.A.1."

As for Annex R.A.1, it now reads in part:

> "The Council
>
> - stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;
> - stating that the reference to the relevant decisions of the Coordinated Organisations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;
> - herewith replacing its decision of December 9, 1981,
>
> decides that:
>
> 1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organisations with respect to adjustment of the basic salary scales of the Coordinated Organisations in Germany.
> 2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organisation and in the Member States.
> 3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organisations.
> 4. The basic salary scales and the allowances for staff shall require the approval of a formal Council resolution."

3. On 12 December 1997, the Council decided, on the basis of the amended texts, to award to staff:

- in Germany: an adjustment of 1.5 per cent for grades 2 to 8 and 2.3 per cent for grades 9 to 14;

- in France: no adjustment for grades 2 to 8 and an adjustment of 3.2 per cent for grades 9 to 14;
- in the United Kingdom: an adjustment of 2.9 per cent for grades 2 to 8 and no adjustment for grades 9 to 14;
- in Italy, an adjustment of 4.0 per cent for grades 2 to 8 and 7.5 per cent for grades 9 to 14.

4. The complainants, taking the view that the salary adjustment was lower than what they were legally due, i.e. what was adopted by the Coordinated Organizations, addressed to the Director-General appeals against the individual decision applying to each of them the Council's general decision of 12 December 1997, as reflected in their pay slips for July to December 1997, and asked that, if their appeals were not accepted, they should be given leave to refer the matter directly to the Tribunal.

5. The Director-General, considering the appeals to be invalid because, in his view, they had not been introduced in accordance with the applicable rules, rejected the complainants' requests.

6. The complainants appealed directly to the Tribunal to request the quashing of the decision to award them a salary adjustment lower than that which they considered to be legally due to them and the drawing of all the appropriate conclusions therefrom. They argue in their complaints that first the new provisions of Article R 4 1.01 of the Staff Regulations were adopted in breach of the procedure provided for in Article R 7 1.01 of the aforementioned Regulations, and that, secondly, the decision under challenge was based on an unlawful system and that it violates their acquired rights.

On receivability

7. The Laboratory maintains that the complaints are irreceivable because they are not in keeping with Article VII of the Statute of the Tribunal. It states that the complainants had been clearly informed that the Director-General "was not prepared to accept internal appeals that did not

comply with the basic requirements laid down in the Staff Regulations". Since the appeals submitted had not, according to the Laboratory, respected the Staff Regulations, they were deemed to be invalid. Consequently, according to the defendant organisation, the complaints filed directly with the Tribunal should be declared irreceivable for failure to exhaust internal remedies.

8. Article R 6 1.04 of the Staff Regulations, the requirements of which would not have been satisfied by the complainants' appeals, provides that internal appeals must state all grounds of appeal and be accompanied by all documentary evidence.

The Tribunal considers that this argument is not acceptable. The appeals submitted by the complainants to the Director-General clearly stated, even if succinctly, the pleas they pressed and the documentary evidence was well-known to the Laboratory since it consisted of general decisions of the organisation, individual decisions, or official correspondence.

As the complainants have fulfilled the requirements of Article R 6 1.04 and thus exhausted all internal remedies the Tribunal does not conclude that their complaints are irreceivable.

On the breach of the procedure provided for in Article R 7 1.01

9. The Laboratory is accused of having adopted the amendment to Article R 4 1.01 of the Staff Regulations in breach of the procedure provided for in Article R 7 1.01 which states that:

> "The Standing Advisory Committee shall advise the Director-General on general questions concerning the personnel, without prejudice to relations between individual members of the personnel and the Director-General."

The complainants maintain that the amended text of Article R 4 1.01 adopted by the Council was not submitted beforehand to the Standing Advisory Committee. It should be pointed out, first of all, that Article R 7 1.01, quoted above, does not oblige the Director-General to consult the Standing Advisory Committee at every stage of the preparation of a proposed amendment to a provision relating to general questions concerning the personnel; nor does it expressly provide that the Committee has to be consulted again if only stylistic changes have been made to a text after the Committee has examined it. In the present case, it is clear from the files that the Director-General did consult the Standing Advisory Committee on the proposed modification of the decision of 9 December 1981 concerning the adjustment of staff members' salaries. This clearly emerges from the statement by the Administrative Director to the Finance Committee, as quoted, and not contested, by the complainants:

> "The Administration now feels that the text put to [Standing Advisory Committee] could be simplified. Rather than consult the full [Committee] again the simplified wording was referred to the Staff Association Chairman. He had no comment to make on the proposed text other than to repeat the Staff Association's opposition to the Council's Resolution."

Since the amended text submitted for the adoption of the Council was only a simplified version, without modification in substance, of a text already submitted to the Standing Advisory Committee, the Tribunal holds that there has been no violation of the procedure provided for by Article R 7 1.01 and is of the opinion that the plea is without merit.

On the unlawfulness of the system under which the challenged decision was adopted

10. The complainants assert that the system adopted for the adjustment of their salary is unlawful in that it is contrary to the general principles of law governing the matter. In their view, it is a system which leaves the door open to arbitrariness since it does not respect the obligation of an international organisation to bring its conduct and that of its staff members into line with the rules it has itself established and the general principles of law, as noted in the Tribunal's case law. They recall that the case law in the matter of salary adjustment relies on a number of principles which international organisations must respect when they establish a cost of living adjustment system; in particular, they must respect the principle of legal protection.

11. As indicated in Judgment 1821 (*in re* Allaert and Warmels No. 3):

> "The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:
>
> (a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.
>
> (b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.
>
> (c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.
>
> (d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6."

12. In their plea on the merits, the complainants assert that the Laboratory breached the general principles of international civil service law and the Tribunal's case law, both referred to above, and did not respect its own internal rules.

13. The complainants first of all maintain that, in revising the Staff Regulations, the organisation chose the most arbitrary position, whereby it considered that it was free to adjust or not adjust the remuneration by criteria that depended on its own evaluation of its own budget situation. For them, this means that the organisation will continue to use a reference that only theoretically derives from the decisions of the Coordinated Organizations and will downwardly adjust staff remuneration for reasons of budgetary considerations. This attitude, in their view, is a breach of the most elementary good faith as well as the principle of legal protection.

14. The Tribunal notes that the analysis of the new provisions, presented by the complainants, does not conform to reality. In fact, the revised provisions of the Staff Regulations establish that the Council must

use the index of the Coordinated Organizations as an "orientation" and that, in evaluating whether this index must be applied as a net salary adjustment, it must take into account the pertinent criteria including the actual economic, budgetary and social situation in the organisation and the member States. At the same time the new provisions do not provide for the automatic application of any particular method of adjusting salaries, which is not against the principles indicated above. It appears from the above that all revisions made must be based on certain criteria which are as reasonable and objective as possible in relation to the decision to be taken.

It is regrettable that the Laboratory did not adopt a more precise methodology for adjusting salaries but the new system was instituted in order to introduce greater flexibility with regards to decisions of the Coordinated Organizations while maintaining the guarantee that all pertinent interests, including the legitimate interests of staff members, are taken into account in the decision-making process. In themselves, the new provisions in force are not in contradiction with the principle indicated in section (c) of consideration 11 above, nor do they violate the other principles mentioned in the same consideration. It should be noted that the Tribunal has held on numerous occasions that organisations are entitled to change the reference standards or system for adjusting the salaries of staff provided that they respect the forms and procedures laid down in their statutory rules, and do not, of course, violate the other principles mentioned above.

It is only when the application of these rules would result in impairing the guarantees offered to international civil servants and, more particularly, their right to receive – in the interest of the international civil service itself – a level of remuneration equal to that in countries where, for comparable qualifications, the salaries are the highest, that a challenge could justifiably be made. The complainants have not given any indication to the Tribunal that the salary scales for July to December 1997, as fixed by the Council's decision of 12 December 1997 – setting the adjustments as indicated under A above – have had the effect of keeping the salaries of staff members, without proper reasons, at a level that would be manifestly inadequate.

15. As for the particular issue of whether the Council's decision of 12 December 1997 respects the internal rules of the Laboratory, it should be pointed out that the case law cited by the complainants, notably Judgment 1682, is not applicable to the present case as that judgment was based on texts that have not been in force since 4 July 1996.

There is nothing in the file which makes it possible to conclude that the decision of 12 December 1997 was taken in breach of the system established from 4 July 1996 onwards whereas, in the case forming the subject of Judgment 1682 mentioned above, the Tribunal could not but find that the Laboratory was in breach of the legal rule that it had itself imposed by the decision of 9 December 1981.

16. The complainants raise the question as to whether the impugned decision does not violate the principle of equality by establishing for staff members based in Germany treatment different from that accorded to staff members based outside Germany, and by establishing discrimination in terms of grade. This plea cannot be accepted since the purpose and intended effect of the system applied are to preserve purchasing power parities between all staff members and that there is nothing in the complaints to indicate that the pay slips applying the new provisions reveal any genuine discrimination.

The Tribunal, after analysing the documents produced, particularly the report of the Finance Committee, finds pertinent the explanations of the Laboratory indicating why different adjustment rates according to grade and duty station have been deemed necessary.

17. As for the plea based on the new wording of Annex R.A.1 which makes it possible to reduce pay by applying to it negative indexes and which would seem to be "contrary to the general principle of law constituted by the Noblemaire principle", the Tribunal considers that it could be examined only if the disputed pay slips embodied a reduction in remuneration, and this is not the case.

18. The complainants consider that their acquired rights have not been recognised in the new Regulations: the Laboratory was obliged, in their view, to ensure that their pay was adjusted to the cost of living. Such an obligation, they state, was incumbent upon the Laboratory when they entered its service and thus forms part of their basic and essential conditions of employment and, by not ensuring them an adjustment of pay to the cost of living, the defendant organisation is breaching their right to maintain their salaries.

The Tribunal points out that international civil servants do not have an acquired right - any more than national civil servants - to an automatic indexing of their salaries. As recalled in Judgment 1118 (*in re* Niesing No. 2 and others), the establishing of regulations for the periodic adjustment of salary is within the discretion of the organisations, provided that these regulations do not violate the principles of international civil service law and that their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between those organisations and their staff members. In the present case such an erosion has not been proved and the Tribunal has no reason to conclude that the salary levels decided upon for the year 1997 jeopardise the basic conditions of employment to the preservation of which the complainants are entitled.

19. It follows from all the foregoing that the complaints must be dismissed as being without merit.

DECISION

For the above reasons,

The complaints are dismissed.

DISSENTING OPINION BY MR JUSTICE HUGESSEN

For the reasons already set out in Judgment 1912 (*in re* Berthet No. 2 and others) I dissent from the views expressed by the majority.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, Mr Julio Barberis, Judge, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JULIO BARBERIS

SEYDOU BA JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Dror (Nos. 1 and 2)** **Judgment 1914**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr David Mark Dror against the International Labour Organization (ILO) on 14 September 1998 and corrected on 22 October 1998, the ILO's reply of 25 January 1999, the complainant's rejoinder of 26 February and the Organization's surrejoinder of 31 May 1999;

Considering the second complaint filed by Mr Dror against the ILO on 23 April 1999 and corrected on 7 July, the Organization's reply of 16 August, the complainant's rejoinder of 17 September and the ILO's surrejoinder of 21 October 1999;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Israeli citizen who was born in 1943, joined the International Labour Office, the ILO's secretariat, in February 1982 at grade P.3.

On 31 May 1988 the position of Secretary of the Staff Health Insurance Fund (the Fund) of the ILO and the International Telecommunication Union (ITU) was put up for competition. The vacancy notice referred to Article 4.12 of the Regulations of the Fund. This Article, which concerns the Secretary of the Fund, reads in part:

> "1. After consultation of the Management Committee and in agreement with the other executive head, either the Director-General of the ILO or the Secretary-General of the ITU shall appoint an official of his organisation to be Secretary of the Fund.
>
> 2. The Secretary shall be responsible for the current administration of the Fund in accordance with these Regulations and the administrative rules and subject to the general authority of and particular directives from the Management Committee and the Standing Subcommittee [of the Fund]."

The Management Committee is a joint body composed of representatives of the insured persons and representatives of the executive heads of the two organisations. It appoints the Standing Subcommittee, to which it may delegate certain aspects of the management of the Fund. Having won the competition, the complainant was appointed Secretary of the Fund and promoted to grade P.4 as from 1 September 1988. He was given an indefinite appointment as from 1 January 1989. His two performance reports covering the period from December 1987 to November 1991 were excellent. Those for the period from December 1991 to November 1997 were never completed. Following the reclassification of the post to grade P.5, the complainant was accordingly promoted as from 1 December 1993. As from 1994 he made it known to the Administration that he wished to be transferred and applied for several posts within and outside the ILO.

By a minute of 3 June 1996 that the complainant sent to his second-level supervisor, the Director of Personnel, he complained of the lack of resources allocated to the Fund. He received no response.

In 1996, relations between the Secretary and some members of the Management Committee, particularly the Chairperson, deteriorated. At a meeting of the Committee on 2 July 1996 the Secretary left the room after insulting the Chairperson. The Director of Personnel said that she would not take disciplinary action if he wrote a letter of apology, which he did. On 6 January 1997 she wrote a "note for the file" asking that a transfer within or outside the ILO be identified as soon as possible. In a communication of 14 February 1997 the complainant objected to the existence of this note and to the fact that it gave the impression that her request for his transfer was linked to the incident.

Relations between the complainant and his first-level supervisor, the Chief of the Personnel Administration Branch (P/ADMIN) appointed in August 1996, had been difficult from the start. According to the complainant, she harassed him and failed to consult him or keep him informed of matters concerning the Fund, particularly a feasibility study on the rationalisation of the Fund. The Chief of P/ADMIN, for her part, found the complainant uncooperative.

At a meeting on 9 December 1996 with the Director of Personnel and the Chief of P/ADMIN, the complainant was told that a hidden video surveillance system had been installed in one of the Fund's offices following a complaint by one of the occupants. The complainant objected, among other reasons, because the office in question served as the reception counter for Fund members and was shared with another occupant who had not been told about the surveillance system. On 6 March 1997 the Director of Personnel met with the Fund's staff. She informed them that to her knowledge there were no cameras in place on the Fund premises and that, in general, if one were to be placed in an office, it would be a security measure taken with the knowledge and consent of the occupant. The complainant again objected to the surveillance system. In a minute of 18 March the Director of Personnel took him to task: at the meeting of 6 March he raised a confidential matter which she planned to deal with on a general level; moreover his manner had been aggressive. She added that she was concerned about the issue, that she would raise the matter with the Office of the Legal Adviser and would keep the complainant apprised of the advice and opinions she received. But despite a reminder he sent on 2 October 1997, the complainant received no information.

At a meeting on 22 January 1997 with the Director of Personnel and the Chiefs of P/ADMIN and the Personnel Planning and Career Development Branch (P/PLAN), the complainant learned that the position of Deputy Secretary, which had not been filled despite commitments made to the Management Committee in September 1994, was to be abolished and that the allocation of resources for the development of a health insurance information system – HIIS – would be suspended while waiting for the report on the rationalisation of the Fund. In a minute of 27 January the complainant pointed out that this would jeopardise the whole project and would, in any event, prevent the target date for start-up, set by the Management Committee, from being met. He proposed a meeting of all parties involved. He received no reply.

By a minute of 21 March 1997 the Chief of P/ADMIN asked all Fund staff to send her a description of their duties. In a minute of 24 March the complainant expressed surprise that she had not submitted this request through him or informed him in advance. Citing Article 4.12, paragraph 2, of the Regulations of the Fund, he asserted that she was intervening in matters that fell exclusively within his responsibility. He further observed that the Personnel Department already had the job descriptions and that the performance appraisals relating to his staff, which were up to date, also contained job descriptions.

In May 1997 the Management Advisory Services Unit (PROG/MAS) was asked to review the operations of the Fund's Secretariat. The resulting report, dated 27 June, recommended appointing someone to head the HIIS project; transferring the Fund's Secretariat to the Finance Department because the senior management of the Personnel Department was unable to devote "adequate time and attention" to it; revising internal budgeting arrangements for the Fund to protect it from the financial problems of the ILO; appointing a deputy secretary; and reorganising the work of claims processors.

On 20 May 1997 the Chief of P/ADMIN asked to receive regularly the outgoing correspondence of the Fund, including correspondence of a confidential nature. The complainant invoked the "principle of medical confidentiality" and sought the advice of the President and Vice-President of the Management Committee – who could not agree – as well as that of the legal advisers of the ILO and the ITU who recommended submitting the question to the Management Committee. In a minute of 25 September 1997, copies of which were sent to the Director of Personnel and all members of the Management Committee and placed in the complainant's personal file, the Chief of P/ADMIN took the complainant to task for refusing to cooperate and for invoking the authority of the Committee in order to withhold information from the Administration.

The complainant took sick leave from 23 June to 4 September, his doctor having diagnosed a depression due to overwork.

At a Committee meeting of 10 October, at which the complainant's transfer was discussed, the former Chief of P/ADMIN, who had been assigned to other duties as from 1 October but was still a Committee member, informed the Committee that the administrations of the ILO and ITU intended to proceed with the transfer without delay. She also informed the Committee of the Director of Personnel's position as indicated in a minute addressed to the complainant on 3 October. The Director of Personnel did not question his technical capabilities but noted that in the past two years he had encountered difficulties in his relations with some members of the Committee. On several occasions she had encountered a negative and uncooperative attitude on his part and had concluded that he no longer had the confidence of the two administrations. It was, therefore, in the ILO's interests to transfer him without delay. The transfer would not be detrimental to his career and he would be temporarily transferred to a position in the Personnel Department. The complainant made a statement to the Committee to the effect that he had not asked to be "dismissed" from his duties and that the haste with which the matter had been submitted to the Committee had prevented him from putting his case properly and amounted to a hidden disciplinary sanction which was an affront to his dignity and his good name. He asked the Committee to defer its decision. The Chairperson proposed that the Committee continue the discussion without the Secretary, which it did after consulting the Deputy Legal Adviser of the ILO.

On the same day, 10 October 1997, the complainant replied to the minute of 3 October. He objected to the transfer, asserted that the criticism of his work should have been mentioned in his performance reports and that the Director of Personnel had no authority to sanction him. He suggested that "realistic alternatives" for his transfer should be discussed.

Assisted by a representative of the Staff Union, the complainant had several meetings with the Director of Personnel about a possible transfer. He refused to be transferred away from headquarters and named a number of positions he was interested in, particularly in the Social Security Department (SEC SOC). The Director of Personnel proposed putting him on special leave with pay for two to three months until a new position could be found. He replied that, without a guarantee that he would be transferred at the end of the leave, he was not interested.

By a minute of 28 October 1997 to the Director of Personnel, copies of which were sent to the executive heads of the ILO and the ITU, the members of the Committee and the Staff Union, the complainant said that he would regard a transfer as a covert disciplinary sanction. He nonetheless laid down conditions for the transfer should it take place. On 29 October the Director of Personnel informed him that "the Director-General, in agreement with the Secretary-General of the ITU, and after consulting the Management Committee of the Fund" had decided that the Committee would be assisted by an interim Secretary as from 3 November, that she would inform the Fund's participants in a way that would not adversely reflect on his competence and that she would consult him in this connection. He would be informed of his new assignment in a separate letter.

In a letter of 30 October the Chairperson of the Staff Union Committee told the Director of Personnel that he was concerned about the situation of the Secretary of the Fund and that he considered the matter to be "extremely serious".

By a minute of 31 October the Director of Personnel informed the complainant that he would be assigned to the Personnel Department until a position was found.

On 4 November the Director of Personnel gave the complainant the draft of a text officially announcing the change of Secretary. In a minute of 12 November 1997 the complainant objected to the draft. The announcement was finally published early in 1998 without any agreement on its content having been reached.

On 10 December 1997 the Director of Personnel told the complainant that the Director-General had decided to transfer him, as from 1 January 1998, to a P.4 position in SEC SOC. He would keep his P.5 grade.

On 20 April 1998 the complainant lodged an internal complaint under Article 13.2 of the Staff Regulations against the Director of Personnel's minute of 29 October 1997 informing him that he would be replaced and later transferred. In a minute of 11 May 1998 the Director of the Office of the Director-General replied that the Organization could not guarantee a reply within the prescribed time limit. By a further minute of 23 July he sent the complainant the comments made by the Director of Personnel and the former Chief of P/ADMIN on the complainant's internal complaint, together with a preliminary analysis, asking for his observations. On 6 August the complainant asked the Director-General to send him a number of attachments mentioned in the three documents. On 14 September 1998 he filed a first complaint with the Tribunal against the implied rejection of his internal complaint.

By a letter of 25 January 1999 – the decision he impugns in his second complaint – the Director of the Office of the Director-General rejected the internal complaint on the latter's behalf.

B. The complainant submits in his first complaint to the Tribunal that the decision of 29 October 1997 is unlawful because he was not given a hearing or sufficient notice. Since it did not assign him to a new position the decision did not constitute a transfer but a "dismissal from his duties amounting ... to a covert disciplinary sanction".

He alleges bias on the part of his supervisors and contends that the impugned decision shows abuse of authority. According to him, the Organization allowed the Personnel Department to conduct a "war of attrition" against him and therefore owes him compensation for the injury caused. Moreover, it failed in its duty of respect towards him by handling the transfer in such a way that it was bound to be construed within the ILO as a repudiation of the quality of his work and competence.

The complainant asks the Tribunal to declare that the Organization treated him wrongly and acted in breach of his personal rights; to rule that the impugned decision is unlawful; to award him three years' pay in moral damages; to order the ILO to destroy any document concerning him which he has not initialled and which is not in his personal file; to state that his absence from work from 23 June to 4 September 1997 was due to service-incurred illness within the meaning of Article 8.3 of the Staff Regulations and award him all consequent redress; to order the ILO not to complete his performance reports for the period 1991-1997 without prejudice to his career; and to award him 50,000 Swiss francs in costs.

C. In its reply to the complainant's first complaint the Organization submits that his claims concerning the unlawfulness of the decision and wrongful treatment and his claim to moral damages are irreceivable because he did not wait for a final decision from the Director-General and so failed to exhaust his internal remedies. It contends that there was never an implied rejection, that the final decision was taken on 25 January 1999 within what it deems to be "an exceptionally short" period, and that by filing the complaint too early, the complainant "attempted to obstruct" the internal appeals procedure. As to his other claims, the Tribunal is not competent to entertain them and he has no cause of action.

In subsidiary pleas the ILO submits that the complaint is devoid of merit. Although the complainant was "undeniably a good manager", his relations with the administrations and some members of the Management Committee had deteriorated to such an extent that he had to be relieved of his duties as a matter of urgency. Furthermore, the substance of the complaint largely concerns "disputes between members of the Management Committee and [the complainant] in his capacity as Secretary" of the Fund and is therefore not within the Tribunal's competence.

D. In his rejoinder the complainant submits that the Organization's examination of his internal complaint was merely a "façade". There was therefore no valid reason not to observe the time limit for replies set in the Statute of the Tribunal, particularly as, in his view, the internal procedure afforded none of the safeguards of a proper process.

The complainant considers that he was only doing his duty "in defending the full and proper observance of the Regulations" of the Fund. Since no criticism had been made of his performance in appraisal reports, the ILO cannot now cite poor performance as an additional reason for the impugned decision. It consulted him and the Management Committee only about the practical aspects of the transfer and not the decision itself, which had been taken unilaterally long before.

E. In its surrejoinder the Organization presses its pleas on receivability. On the merits it submits that the issue of observance of the Fund's Regulations or interests is beyond the competence of the Tribunal. Although some of his performance reports were not completed, the complainant was warned several times that "his attitude was wanting". His supervisors will prepare the missing performance reports. The complainant failed to avail himself of the procedure for claiming compensation for service-incurred illness. The amount he seeks in costs is disproportionately high.

F. In his second complaint, in which he impugns the Director-General's final decision of 25 January 1999, the complainant objects to the internal procedure of the ILO: the Director-General fails to observe time limits, particularly those set in the Statute of the Tribunal; he seldom consults the Joint Committee; the investigation of the case was not impartial because it was entrusted to the legal department, which is responsible for defending the Organization.

On the merits he asserts that the Organization has, "in effect, downgraded him": he is now on a P.4 position though he has held grade P.5 since 1993. He presses the pleas made in his first complaint. In rebuttal of the defendant's arguments in that complaint he denies that his conduct or his personality were in any way responsible for the deterioration in his relations with the Fund's organs and asserts that the Organization may, *ex officio*, declare an illness to be service-incurred when it has the necessary information, which it did. He asks to have the complaints joined and presses his claims.

G. In its reply to the second complaint the ILO asserts that the complainant's objections to the internal procedure are put forward in support of his first complaint, the procedure of which is already closed. However, subsidiarily it submits an additional brief in which it replies to his objections, stating that the final decision was notified within a reasonable period, that referral to the Joint Committee is discretionary and that the Office of the Legal Adviser examined the internal complaint objectively.

The Organization does not object to a joinder but maintains that the Tribunal is not competent to entertain the complainant's claims concerning the destruction of documents, the establishment of the performance reports and the occupational origin of his illness. It adds that for the first two claims he has no cause of action and that he has failed to exhaust his internal remedies for the third.

On the merits it submits that the decision of 29 October 1997, to transfer him, was at the discretion of the Director-General and shows no flaw. The complainant's attitude appeared unnecessarily contentious and it was in the interests of the department to transfer him in view of the prevailing tension. It denies that the decision was hasty or in breach of his right to a hearing. It contends that the complainant misunderstood his role and denies bias: on the contrary, the Administration was very understanding towards him. It adds that there was no reproof in the letter of 25 January 1999.

H. In his rejoinder the complainant states that he leaves it to the Tribunal to determine if his claims seek performance of obligations deriving from the Staff Regulations or his contract. If this is the case the Tribunal is competent to entertain them. He denies that the Director-General, exclusively, had the authority to transfer him. In his view, the discretionary power of the Director-General was extremely limited in this case by the requirements of Article 4.12 of the Regulations of the Fund. In view of the "tension and the conflicting views about the future of the Fund", the Director-General should have made sure that the transfer was consistent with all statutory requirements. He objects to the establishment *a posteriori* of his performance reports by supervisors who have since changed positions and who are directly involved in the present case.

I. In its surrejoinder the ILO repeats its objections to the receivability of certain claims. It asks the Tribunal to determine whether, in the light of Article 4.12 of the Regulations of the Fund, the Director-General has the authority to transfer an official assigned to the Fund. It observes that the complainant does not state how his transfer was inconsistent with the statutory requirements. According to the Organization, his conditions of employment were not governed by the Regulations of the Fund. In any event the Management Committee was consulted and confirmed that the transfer was warranted.

CONSIDERATIONS

1. The complainant filed a first complaint with the Tribunal on 14 September 1998 pursuant to Article VII(3) of the Tribunal's Statute, against what he considers to be the implied rejection of an internal complaint lodged on 20 April 1998 against his employer, the ILO.

The Organization asks the Tribunal to declare the complaint irreceivable on the grounds, amongst others, that the complainant had failed to exhaust his internal remedies.

On 25 January 1999 the complainant received the final decision of the Director-General of the ILO rejecting his internal complaint of 20 April 1998. He then filed a second complaint to the Tribunal on 23 April 1999 in which he maintained all the claims submitted in his first complaint and sought a joinder of the two complaints. The Organization having raised no objection, the Tribunal will join the complaints and need not, therefore, rule on the receivability of the first. Since the second complaint is receivable, subject to consideration 16 below, the Tribunal will examine the merits.

2. The gist of the case is as follows:

The complainant joined the ILO in 1982.

Following a competition and the Director-General's decisions of 31 August and 23 November 1988 the ILO:

- promoted him from grade P.3 to grade P.4 as from 1 September 1988;
- appointed him Secretary of the Staff Health Insurance Fund of the ILO and the ITU;
- gave him an indefinite contract as from 1 January 1989.

The Fund is separate from the ILO. For matters of policy and day-to-day management it is subject to the decisions of a Management Committee and its Standing Subcommittee, composed of members appointed by the executive heads of the ILO and the ITU and of members elected by the staff of the two organisations.

By a decision of 29 October 1997 the Director-General of the ILO relieved the complainant of his duties as Secretary of the Fund. On 20 April 1998 the complainant filed an internal complaint with the Director-General of the ILO under Article 13.2 of the ILO Staff Regulations.

Having received no reply to his internal complaint the complainant came to the Tribunal. He received the final decision negating his internal complaint on 25 January 1999, after which he filed a second complaint to the Tribunal. His claims are mentioned under B above.

3. The Tribunal notes that the complainant does not seek the quashing of the decision of 29 October 1997 because, he says, he does not wish to compromise his assignment to his present position or weaken the professional situation of his successor in the Fund's Secretariat.

However, he says he does intend to obtain redress for the injury he has suffered, which implies recognition of the unlawful nature of the decision. He therefore asks the Tribunal to rule that the Organization's "unwarranted treatment" of him was unlawful, "both as a prerequisite for contesting the validity of the decision of 29 October 1997, and as an element of redress".

He contends that that decision was unlawful in terms both of procedure and the regulations in force. He submits that this decision shows abuse of authority, that the Organization is largely responsible for the deterioration in the working relations between himself and the Personnel Department of the ILO and that it failed in its duty to treat staff members with dignity.

4. Before considering the pleas individually, it is necessary to note that the complainant is still on the staff of the ILO and is therefore subject to the provisions of the ILO Staff Regulations. The decision of 29 October 1997, regardless of whether it is construed as a dismissal from his duties or a transfer, was taken by the Director-General in accordance with the discretionary authority conferred on him by Article 1.9(a) of the Staff Regulations which allows him to assign any official to "his duties and to his duty station subject to the terms of his appointment, account being taken of his qualifications". Such decisions are subject only to very limited review by the Tribunal and the grounds on which they may be ruled unlawful are established by a long line of precedent. The Tribunal's power of review is all the more limited here because the evidence shows that the decision arose, not from the complainant's conduct, but rather the difficulties in his relations with the parties concerned.

In these circumstances, there is no need to dwell on his accusations against his supervisors since all parties acknowledge the deterioration in relations that prompted the decision.

On the unlawfulness of the decision

5. From the standpoint of procedure, the complainant points out that neither the ILO Staff Regulations nor the Regulations of the Fund contain provisions on the termination of duties of the Secretary of the Fund; consequently, where the Secretary is removed from office at his own request or at least with his consent, in keeping with the rule that similar acts require similar procedures, it may suffice to follow the procedure established for his appointment in Article 4.12, paragraph 1, of the Regulations of the Fund cited under A. However, where a decision is imposed by one of the organisations, respect for the staff member's rights requires compliance with additional and formally established rules that guarantee a fair process.

The complainant considers that, since there was no urgency, his right to a hearing and to adequate notice before the transfer should have been respected.

6. According to the complainant, in view of the particular nature of the Secretary's duties, the observance of his right to a hearing obviously required his being interviewed by the Director-General of the ILO (and possibly together with the Secretary-General of the ITU) before the decision was taken. But there was no such interview.

7. As to a staff member's right to a hearing before transfer, the Tribunal has held (in Judgments 631, *in re* Go, and 1496, *in re* Güsten) that:

> "... whether or not there is a specific provision in the Staff Rules, as a matter of contractual obligation the Administration ought not to take a decision injuriously affecting a staff member's career without first, as a matter of natural justice, giving him the reasons for the decision and getting his response."

8. In alleging breach of that right the complainant seems to be objecting not so much that he was not given a hearing but that he was not heard by the right person.

The Tribunal considers that his demand for an interview with the Director-General himself is unwarranted, since the latter is not in a position to follow each and every decision throughout the process leading to its adoption.

The Organization did observe his right to a hearing. The evidence shows that the Director of Personnel, acting on the Director-General's behalf, remained in close consultation with the complainant throughout the process that led to the decision.

9. As to his right to proper notice, the complainant asserts that the decision of 29 October 1997 was notified to him on 30 October 1997 with the order to relinquish his post to an interim Secretary, though "nothing warranted so hasty a dismissal".

It is plain on the evidence, particularly the report of the Chairperson of the Management Committee, that relations between the complainant and most of the people responsible for managing the Fund had deteriorated to such an extent that it had become urgent to replace him in the interests of the proper administration of the Fund.

Furthermore, the complainant was told at least one month before the decision that he was to be relieved of his duties as Secretary of the Fund.

The plea therefore fails.

10. The complainant alleges that the Organization broke the material contractual and statutory rules: either the decision constituted a transfer, in which case the Organization should have notified him at the same time of his new assignment, or the Organization should have considered his case in the light of Articles 12.1 *et seq.* of the Staff Regulations or, by analogy, Article 6.11, and should have followed whichever of the two procedures applied.

It is plain on the evidence that the decision of 29 October cannot be examined in the light of the statutory provisions on disciplinary measures.

Therefore, what needs to be determined is whether the decision was consistent with the statutory requirements and contractual rules regarding transfers and, in particular, whether the ILO notified the complainant of his new assignment at the same time as it removed him from office as Secretary of the Fund.

Although the complainant was not informed of a new assignment before he was actually replaced, this was not the fault of the Organization. In fact he had refused temporary reassignment. The ILO had also explored with him several transfer possibilities well before 29 October 1997. He himself had been seeking transfer for some time and the Administration had already deemed one necessary following a serious incident in 1996. For different reasons the complainant refused all the positions offered to him except the one he now holds and which he seems satisfied with, since he has stated that he does not want to compromise the assignment to his present position.

The plea therefore fails.

On the abuse of authority

11. The complainant submits that the real reasons for the Director-General's decision to relieve him of his duties as Secretary of the Fund are not those that the Organization gave. He contends that the decision was taken because of widely diverging views about the future of the Fund and the best interests of its members; the decision was, therefore, not taken in the institution's interests, but arose from bias on the part of his supervisors, who, in the two years prior to his replacement, tried to "destabilise" him and "discredit" him in his capacity as Secretary.

The plea is unfounded. Nothing in the evidence suggests that the decision was taken on grounds other than the general interest of the Fund; and the complainant's assertions are belied by most members of the Management Committee, who considered that the purpose of the transfer was to ensure that the Fund continued to function properly.

The ILO's responsibility in the deterioration of working relations

12. The complainant submits that the Organization is largely responsible for the deterioration in his working relations with the Personnel Department. He contends that, according to the case law, when relations are difficult owing to professional disagreements it is the responsibility of senior management "to prevent conflictual situations from getting out of hand".

As the ILO rightly observes, the obligation to ensure that conflictual situations do not get out of hand presupposes that the organisation is in a position to do something about the cause of such situations. The Tribunal notes – and the parties do not deny – that the tense situation in the Fund was partly due to the complainant's attitude towards people and bodies he was called upon to work with. Since it was unable to find an immediate remedy to the gradual deterioration in working relations, the Organization took the decision, with the agreement of most members of the Management Committee and the management of ITU, to transfer the complainant in the interests of the proper administration of the Fund.

The plea is therefore unfounded.

On the Organization's failure in its duty to treat staff with dignity

13. The complainant alleges that the ILO failed to prevent the situation from deteriorating to the point where his health was affected following a depression caused by the tense relations with his supervisors and the psychological harassment to which he was subjected.

He submits that the defendant failed, as the situation required, to find a position that met his aspirations and to do its utmost to deal with the transfer in such a way as not to impair his professional dignity within the Organization.

But, in view of all the foregoing and all the evidence on file, the Tribunal considers that the Organization committed no breach of its duty to treat the complainant with dignity.

14. The decision shows no such flaw as to compromise its validity and there was nothing unlawful in the ILO's conduct, contrary to the assertion of the complainant, who fails to prove any breach of his personal rights. Consequently, no redress is due from the Organization. Since the complainant agreed to his new assignment, and stated that he did not wish to compromise it, he may not assert moral injury resulting from the grade attached to his new position, as his transfer involved no change in the grade he holds. His main claim therefore fails.

15. The complainant indicates that his other claims, too, are to be treated as elements of redress for the injury suffered, including the claim concerning his sick leave in the summer of 1997.

Since his main claim fails so, too, must the claims related to it.

16. As to his claims concerning the destruction of files and documents, the completion of his performance appraisal reports for the period from 1991 to 1997 and the attestation that the absence of such reports will not harm his career, the Tribunal considers that, in the absence of any actual cause of action, they must be rejected. So must his claim to recognition of his illness as service-incurred, because he has failed to exhaust the relevant statutory procedures.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Abdur, Drechsler and Zeller**

Judgment 1915

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr Rahim Abdur, Mrs Herta Drechsler and Mr Dietrich Zeller against the International Atomic Energy Agency (IAEA) on 19 June 1998 and corrected on 27 August, the IAEA's reply of 9 December 1998, the complainants' rejoinder of 10 March 1999 and the Agency's surrejoinder of 16 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. According to what is known as the "Flemming" principle, pay of staff in the General Service category is aligned with the best conditions prevailing at each duty station. This principle forms the basis of the "general methodology" used by the International Civil Service Commission (ICSC) in carrying out salary surveys among outside employers and in setting scales of pay for General Service and other locally recruited staff.

In 1992 the Commission revised its general methodology. The survey of relevance to this case was carried out in Vienna in the spring of 1996 in accordance with the revised general methodology.

The complainants are in the General Service category of staff of the IAEA in Vienna.

In notice SEC/NOT/1649, dated 1 October 1996, the Director General informed all the staff that the new salary scale which had been adopted was lower than the scale it replaced by 3.2 per cent. The notice also indicated that the "language factor" would be progressively phased out through four separate one percentage point reductions starting with the April 1996 salary scale resulting from the survey, and thereafter on the occasion of subsequent interim adjustments.

On 29 November 1996 the complainants wrote to the Director General appealing against the decision progressively to phase out the language factor. They requested him to reconsider the decision. If he were unable to grant their request, the complainants asked him to allow them to appeal directly to the Tribunal. In a letter of 22 January 1997 the Director General informed them that he upheld the decision communicated to them previously. However, as he was aware that some staff of the Food and Agriculture Organization of the United Nations (FAO) had filed a complaint with the Tribunal on the same issue, he proposed to await the outcome of that case as he might reconsider his decision. The complainants accepted this latter proposal in a letter dated 25 February 1997.

On 29 January 1998 the Tribunal delivered Judgment 1713 *(in re* Carretta and others). On 4 February 1998, the complainants asked the new Director General of the Agency to reconsider his predecessor's decision in the light of Judgment 1713. In a letter dated 2 April 1998 addressed to each of the complainants, which is the impugned decision, the Director General informed them that he had:

> "reviewed ... Judgment No. 1713 and ... concluded that it does not apply to Vienna because the April 1996 ICSC survey in Vienna established that, although the majority of local employers required their staff to have knowledge of and work in an additional language (frequently English), no additional compensation therefor was paid by any of the comparator employers."

The Director General accordingly informed the complainants that he upheld the impugned decision and indicated that they could appeal directly to the Tribunal.

B. The complainants argue that the Agency reached manifestly wrong conclusions from the information available and that the language factor adjustment is still justified in Vienna.

They emphasise the lack of clarity in the form used for the salary survey conducted in Vienna in 1996 and the unreliable nature of the data gathered from the reference employers.

They say that an analysis of the data on salaries compiled in 1991 and 1996 leads to three main conclusions.

In the first place, the labour market situation in Vienna has not changed to such an extent that the language factor can be granted without any difficulties in 1991, yet be abolished, even progressively, in 1996. At the most, it is only possible to discern a slight "fluctuation", which cannot in any event justify abolishing the benefit.

In the second place, the quantitative analysis of the data compiled in 1996 reveals two major trends: the first lies in the finding that, of the reference employers which provided indications on this point, only a part of the staff is required to work in a foreign language; the second concerns the average, or completely marginal use of the foreign language. In this respect, there is no comparison between the General Service staff of the Agency and the staff of the reference employers. Indeed, while all the staff of the Agency have to work on a daily basis in at least one language other than German, the data from the 1996 survey show that, for the most part, only some of the staff of the reference employers have to work in a language other than German, and even then only occasionally or very marginally.

In the third place, the complainants draw attention, from a qualitative point of view, to the low level of knowledge of the foreign language required by outside employers and the "mundane" nature of the work conducted in that language.

The complainants emphasise that the ICSC itself, in a document dated 9 July 1998, insisted on the fact that international officials have to be fluent in at least one working language of the international organisations concerned. However, the last salary survey conducted in Vienna does not show that the employees selected for purposes of comparison are subject to the same requirement. The comparison is therefore misleading and, as a result, the question of whether to grant a wage supplement has been misrepresented. While it is clear that the question of additional pay does not arise for the occasional and imperfect use of a foreign language, it is entirely appropriate in the case of the constant usage of a foreign language of which the staff concerned have a good or perfect knowledge. The complainants submit that the abolition of the language factor was clearly decided upon for reasons (in all probability of a budgetary nature) which are wholly unrelated to the prevailing practice on the local market, which is the sole determining factor.

They request the Tribunal to quash the decision of 2 April 1998 and to grant them all consequent redress, that is to send the case back to the Agency, particularly for the reckoning of the pay due to them in accordance with the Flemming principle and to grant them costs.

C. In its reply the IAEA states that, given the role and functions of the ICSC, it deemed it appropriate to request the Commission for its comments, which it incorporates into its written submissions.

The ICSC affirms that the 1996 Vienna survey was carried out in a manner which fully respected the Flemming principle.

It submits that the matter at issue in this case is different from the one on which the Tribunal ruled in Judgment 1713. In contrast with the Rome survey, in Vienna the Commission methodically gathered information on whether local employers paid bonuses to staff who were required to work in a language other than the national language. The information gathered revealed that the majority of the local employers surveyed required staff to have knowledge of and work in a language other than the national language (i.e. German), but that no additional compensation was paid for that requirement. The Commission, therefore, properly decided to phase out the language factor. The Commission's decision is in keeping with Judgment 1713 in which the Tribunal held that when local employees are not paid added compensation for working in a language other than the national language, it would be wrong to pay additional bonuses for that requirement to staff of the common system.

The Commission contends that the present case can also be distinguished from the one leading to Judgment 1713 because the evidence submitted by the complainants in that case showed that at least one employer paid such bonuses to its employees. This suggested that other employers surveyed may have paid such premiums, but had not been surveyed on that point. In the case now at issue the information gathered establishes that none of the employers surveyed paid added compensation for that language requirement.

The Commission then refutes the claims made by the complainants. It says that the "phraseology" in the form used for the 1996 Vienna survey regarding the use of languages other than German did not give rise to confusion. Indeed, there is no evidence whatsoever that any of the reference employers surveyed did not understand the questionnaire.

The Commission contends that it is immaterial whether or not there were changes between the 1991 and 1996 surveys. The only pertinent issue is whether the 1996 survey was flawed.

The proportion of staff of reference employers who were required to use a language other than the national language was sufficiently high to offer a valid basis for comparison. The information gathered reveals that most of the employers surveyed required knowledge and usage of a language other than German for more than merely mundane tasks.

The complainants' allegation that the progressive phasing out of the language factor was decided upon for budgetary reasons is supported by no evidence and is therefore unsubstantiated.

In its concluding remarks, the Agency submits that both the staff of the IAEA and employees in the local labour market are usually required to work in one language only, i.e. in German in the local market and in English at the Agency. For some, this language may be their mother tongue and for others it may be a foreign language. For instance, at the Agency there are a considerable number of staff in the General Service category who have English as their mother tongue or major language of education. It would not be justified to pay a language allowance to staff working in their mother tongue.

The Agency emphasises that a specific language allowance is paid to the staff of the Agency under Staff Rule 5.01.7 for the use of additional languages. However, no such allowance is paid in the local market. IAEA staff therefore already have an advantage over employees in the local market with regard to compensation for language skills.

D. In their rejoinder the complainants emphasise the unprecedented nature of the Agency's reply, in which it incorporated and associated itself with the position of the ICSC. They request the Tribunal to judge the lawfulness of this procedure.

The complainants refute the arguments put forward by the Agency to the effect that many of its staff members have English as a mother tongue and that its staff already enjoy an advantage in relation to employees in the local labour market.

They contest the claim that the point at issue in the current case is different from the one on which the Tribunal ruled in Judgment 1713.

They press their claims concerning the unreliability of the data compiled from reference employers, particularly in view of the lack of clarity of the form used for the second salary survey conducted in Vienna.

They reaffirm the conclusions which they draw from their analysis of the salary data compiled in 1991 and 1996.

E. In its surrejoinder the Agency argues that nothing in the Statute or Rules of the Tribunal bars it from seeking technical advice from a competent body in the United Nations system. This is all the more true in a case such as the present one, in which the technical advice sought originates from the ICSC which is the regulatory and coordinating body in the United Nations system and which, under the terms of its Statute, establishes the facts which must be taken into account in the case at issue here.

The Agency and the Commission contend that the points raised by the complainants in the rejoinder simply repeat the arguments made in the complaint.

CONSIDERATIONS

1. The complainants, who are in the General Service category of staff of the International Atomic Energy Agency (IAEA) at its headquarters in Vienna, benefit from a salary increment for proficiency in languages ("language factor").

Following a salary survey conducted in Vienna in the spring of 1996 under the aegis of the International Civil Service Commission (ICSC), the Board of Governors of the IAEA, on the recommendation of the Director General, on 17 September 1996:

- approved the salary scale recommended by the ICSC, which had been established in accordance with the decision taken previously to phase out progressively the language factor of 4 per cent through separate one percentage point reductions on the occasion of each interim adjustment; and
- authorised the Director General to set the date for the implementation of the new salary scale, after consultation with the other Vienna-based United Nations organisations.

2. In a notice dated 1 October 1996, the Director General indicated that, with regard to the language factor:

> "as the survey has resulted in a decrease relative to the April 1995 scale, the ICSC has decided that this factor should not be abolished immediately, but phased out through four separate one percentage point reductions, starting with the April 1996 scale resulting from the survey and thereafter on the occasion of subsequent interim adjustments."

3. On 29 November 1996 the complainants appealed to the Director General against the decision to phase out the language factor progressively. The Director General informed them in a letter of 22 January 1997 that he upheld his decision. Nevertheless, as he was aware that some staff of the FAO had lodged a complaint with the Tribunal concerning the abolition of the above increment, he proposed to await the outcome of the case to reconsider his decision should the findings of the Tribunal so require. This proposal was accepted by the complainants.

4. On 29 January 1998 the Tribunal delivered Judgment 1713 (*in re* Carretta and others) setting aside the decisions of the FAO to phase out progressively any salary adjustment in respect of language proficiency and sent back the cases to the Organization "to reckon the complainants' pay in line with this judgment".

5. On 4 February 1998 the complainants requested the Director General of the Agency to reconsider the decision against which they had appealed. However, the Director General asked the Deputy Director General in charge of Administration to reply that it was "not apparent" that the Agency would have to follow Judgment 1713 and would thus not implement it.

In a letter addressed to each of the complainants on 2 April, the Director General informed them that he had decided to uphold the decision; he indicated that the complainants could appeal directly to the Tribunal.

6. On 19 June 1998 the complainants filed a complaint with the Tribunal requesting it to quash the Director General's decision of 2 April 1998 and grant any consequent redress, that is to send the case back to the Agency for the purposes, in particular, of the recalculation of the pay due to them in accordance with the Flemming principle, and to grant them costs to be determined at the end of the case.

In support of their complaint, they submit that the Agency reached manifestly wrong conclusions from the information available.

7. The Tribunal has addressed the issue of the abolition of the language factor granted to General Service staff working in cities in which the national language is not one of the working languages of the organisation in its examination of the case which gave rise to Judgment 1713. It indicated in that judgment that:

> "the manner of applying Flemming does not turn on such variables as the desire of staff to keep their jobs or the ease or difficulty of finding good local recruits. What Flemming ordains is that General Service staff shall have pay and other terms of employment that match the best on offer at their duty station ... It is

> right to adjust pay by a language factor when jobs that do not require proficiency in a second language are matched with jobs that do. But it is wrong so to adjust pay when the matching is with outside posts that do require proficiency in a second language and that requirement is not compensated."

8. In the present case, interpreting Judgment 1713, the Agency considered that it was not justified in Vienna to pay a language factor since, in its view, although the majority of employers surveyed required their staff to have knowledge of and work in an additional language (frequently English), no additional compensation therefor was paid by any of the comparator employers.

However, the complainants consider that analysis of the salary data shows that outside jobs in Vienna are not at all comparable to those in the Agency, which has drawn manifestly wrong conclusions from the information available. They submit that the language factor is still justified in Vienna.

9. The written submissions show that in 1996 information on salaries was gathered from twenty-two employers. On the question of whether local employers paid compensation to staff who were required to work in a language other than the national language, the Commission emphasised that the methodically gathered information revealed that, although the majority of the local employers surveyed required staff to have knowledge of and work in a language other than the national language, i.e. German, no additional compensation was paid for that requirement.

10. On this point, the complainants consider that, because they are imprecise, the data compiled do not justify the abolition of the language factor. They add that almost all the employers who indicated that some of their staff worked in a foreign language confined themselves to remarks of a general nature and in no way defined the specific tasks for which this language was used, thereby making it impossible to determine jobs which might be comparable in this respect with those at the Agency.

11. The complainants criticise the Commission for not specifying the individual employers, which form a majority of the local employers surveyed, which required their staff to have knowledge of and work in a language other than German.

The Commission retorts that the questionnaires submitted as evidence show that all the employers surveyed, with the exception of only one, require their staff to have knowledge of and work in a language other than the national language. This statement is borne out by the written submissions.

12. The complainants contend that the abolition of the language factor is not justified in view of the fact that the employers surveyed did not indicate that they required their staff to work in a language other than German.

The Tribunal agrees with the Commission that, with twenty-one of the twenty-two employers surveyed indicating that they require the use of another language, the employers covered by the survey constitute a valid basis for comparison with the common system on the question of the usage by staff of a language other than German in Vienna.

13. The complainants submit that the questionnaire was drawn up in terms which were too general and that it was ambiguous. With regard to the alleged unreliability of the information gathered, contrary to the claims made by the complainants, the questionnaire was in fact clear: question 3.2(c) specifically covered the issue of whether a premium was paid to staff for the use of additional languages. And the reply was clear, since the twenty-one employers requiring their staff to use a language other than German indicated that they did not pay a premium for that requirement.

14. Furthermore, analysis of the questionnaire shows that employers were indeed requested to indicate, in addition to base salary and remuneration elements, the bonuses which they paid to individual employees or groups of employees covered by the survey.

The questionnaire, therefore, covered all outside jobs and provided the opportunity to determine for each outside job selected whether premiums were paid for the usage of another language. The ambiguity which the complainants say existed in the wording of the questions does not appear to have had any influence on the replies made by the employers and no evidence is produced that these employers were confused as to the meaning of the questions. The information gathered, irrespective of the imperfections pointed out, which are inherent in any survey of this nature, provided a basis for determining the knowledge of and extent to which a language other than the national language was used, and also whether additional pay for the usage of such a language could be justified.

Moreover, it should be borne in mind that, in this type of survey, there can be no perfect match and that such a match is not necessary to reach sound conclusions.

15. The complainants contend that the survey is flawed because none of the employers surveyed replied to the question covering the basis on which compensation is determined for the usage of another language. This plea is not pertinent, since the question could only concern employers answering in the affirmative to the question of whether they paid a premium for the use of additional languages. None of the employers surveyed replied in the affirmative to this question.

16. The complainants observe that certain of the employers surveyed belong to the petroleum industry and that the collective agreement applying to the industry provides that shorthand typists and correspondence clerks working in a language other than German are recompensed by being classified in a higher occupational group.

With regard to this new argument, it should be noted that the survey was conducted on the basis of a comparison between jobs in the common system and those of outside employers selected for reference purposes. During the survey, outside employers were requested to identify jobs held by their staff which carry similar responsibilities and require similar qualifications to those included in the benchmark job descriptions. Once a job match was established, the total pay for the job was used to calculate the correct salary figure for that particular outside job. The total pay included the salary and related benefits, as well as any adjustment for special factors, such as knowledge of languages. This remuneration was subsequently used to establish pay for jobs in the common system. Therefore, if jobs covered by a collective agreement were included in the survey in the case of the petroleum industry, compensation for the use of a second language in these jobs (in the form of being placed in a higher occupational group) was fully taken into account, since the pay used as a reference to establish the salaries for jobs in the common system was the total pay of the surveyed outside jobs at the higher occupational group level.

17. The complainants argue that not all employees of the outside employers selected for the survey are required to work in a language other than German, whereas all common system staff are required to do so. While this statement is correct, the information gathered reveals that the proportion of employees working for outside reference employers who are required to work in a language other than the local language is high enough to offer a valid basis for comparison.

18. It is argued that the survey is flawed because the staff of the surveyed employers in Vienna are only required to work in a language other than German occasionally, whereas common system employees do so on a daily basis.

This argument cannot stand, since the information gathered shows that, even though some staff do not use a language other than German on a daily basis, the use of another language by staff of outside employers is sufficiently common to provide a valid basis for comparison. Moreover, the Tribunal holds that it is not necessary to achieve a perfect match between outside jobs and those in the common system. There must merely be sufficient similarity between these jobs.

19. The complainants contend that the comparison between common system staff and outside employees is not valid because the level of

language proficiency required of staff in the common system is higher than the level required among outside employees.

The written submissions show that most of the employers surveyed required more than a basic knowledge of a language other than German, with thirteen employers indicating that they required an intermediate level of language proficiency from their employees and others that they required significant levels of language proficiency. The objection is, therefore, unfounded.

20. The Tribunal finds from the above that the 1996 survey was conducted properly and that it provided a basis for determining that, even though the majority of local reference employers in Vienna required their staff to have knowledge of and work in a language other than the local language, they paid no additional compensation for that requirement.

21. The question of the procedure used by the Agency in its reply, in which it associated itself with the position of the ICSC, has no bearing on the decision. Nothing prevents the defendant from seeking a technical opinion, which it is free to include or not in its written submissions to the Tribunal.

22. The complaints therefore fail.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Dekker (No. 2)** **Judgment 1916**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Hans Dekker against the European Southern Observatory (ESO) on 18 August 1998 and corrected on 20 November 1998, the Observatory's reply of 24 February 1999, the complainant's rejoinder of 4 June and the ESO's surrejoinder of 4 August 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman who was born in 1951, joined the staff of the ESO at its headquarters at Garching, near Munich (Germany), on 1 November 1981 under a fixed-term contract. He was granted an indefinite appointment on 19 December 1988.

In 1997, the ESO broached the subject of revising the scale of reimbursements under its health insurance scheme with a view to stabilising the premium rates, achieving savings in the management of the contract concluded with the insurers, represented by the insurance brokers Van Breda, and aligning the level of protection with that of other international organisations (the scheme then in force provided for the full reimbursement of most types of medical expenses).

By an internal memorandum of 29 December 1997, the Head of Administration informed all ESO staff members and pensioners that an agreement had been reached with the insurance companies concerning reimbursements for 1998. The new contract, which provided in particular for a reduction to 80 per cent of the reimbursement rate for certain types of medical expenses and the introduction of annual ceilings, was to be finalised and signed in January 1998. The new reimbursement scheme would enter into force on 1 January 1998.

The complainant's salary statements for the months of January and February 1998 showed an amount of total deductions which was unchanged in relation to the month of December 1997. However, the salary statement for March 1998 bore the following indication: "salary adjusted due to: new health [insurance] rates".

By a letter of 14 May, addressed to the Director General, the complainant lodged an internal appeal against the application to his case of the decision to modify the health insurance scheme, as reflected in his salary statement for the month of March 1998. In a letter of 25 May 1998, which is the impugned decision, the Head of Administration replied, on behalf of the Director General, that his appeal was time-barred and therefore irreceivable.

By an internal memorandum of 2 June, the Head of Administration informed all staff members that copies of the new health insurance contract for 1998 were available. It is indicated on the contract that the insurers only signed it on 23 April 1998.

B. The complainant contends that the impugned decision is unlawful. He says that his salary statement for the month of March 1998 constitutes a measure to apply in his case a decision which was not yet in force, since the insurance contract was not signed by Van Breda until 23 April. This was in breach of the principle of non-retroactivity.

The complainant requests the Tribunal to set aside the Director General's decision of 25 May 1998, to allow all consequent redress and to grant him costs.

C. In its reply the Observatory contests the receivability of the complaint. It argues that, at the end of 1997, the complainant received the memorandum of 29 December 1997 informing him that the new reimbursement scheme would come into effect on 1 January 1998. This general decision was applied to him for the first time in January 1998 on the occasion of the payment of his salary. The complainant's internal appeal, dated 14 May, was not therefore lodged within the statutory time-limit of sixty days. Consequently, his complaint is irreceivable under Article VII of the Statute of the Tribunal.

It adds that the complainant's pleas are devoid of merit. The ESO and the insurance brokers Van Breda had reached agreement on the essential points of the contract at the end of 1997. They were, therefore, contractually bound on 1 January 1998 since a contract is concluded when the parties have reached agreement on the points which they consider to be essential. Furthermore, while the final document was signed on 23 April 1998, in its Article 3 it states that it entered into force on 1 January 1998.

D. In his rejoinder the complainant submits that his complaint is receivable. He contends that the ESO has not provided evidence of the existence of the new contract on 1 January 1998. He argues that, even if ESO appears to base itself on a contractual practice which is fairly common in Germany, under which the parties to a contract subscribe in writing to the points on which they have agreed as the negotiations progress, the above parties are not bound before the conclusion of the contract. The new contract only acquired binding force on 23 April 1998, the date it was signed by Van Breda. The complainant's salary statement for the month of March 1998 therefore constituted the first application in his case of the new health insurance scheme.

The complainant observes that the operating cost of the previous health insurance scheme did not justify the "unavoidable reduction" of reimbursements.

E. In its surrejoinder the ESO contends that it is within its discretion to review the health insurance scheme.

On the question of receivability, the only date that counts is that on which a general decision is communicated to the staff. The contractual practice referred to by the complainant does not exist. German law follows the principle of the contractual freedom of the parties.

In its view, the complainant is merely mounting a general challenge against the application in his case of the new insurance contract and does not claim to be individually affected by the decision.

CONSIDERATIONS

1. The complainant has been a staff member of ESO since 1 November 1981 at its headquarters in Garching (Germany). In this capacity, he benefits from the social security scheme, under Article V 1.01 of the International Staff Rules, which safeguards members of the personnel of ESO and their families against the economic consequences of illness, accidents and disability.

2. Article R V 1.01 of the Staff Regulations states that the social security schemes shall include a health insurance scheme agreement approved by the Council of the ESO, covering all staff members against the economic consequences of illness and accidents. Article R D 2.01 places the obligation on the Organisation to insure all staff members against the contingencies of occupational illness and occupational accidents.

3. To give effect to the above obligations, the ESO concluded with a group of insurance companies, acting through the insurance broker Van Breda, a group insurance contract covering staff members against the above risks.

The yearly premium rates are calculated in percentages of the basic salary of the insured persons. These premiums are paid in monthly instalments. One-third is borne by the insured staff members and two-thirds by the Observatory. The premiums paid by staff members are deducted from their monthly pay. The related sums appear on their monthly salary statements under the heading "total deductions", which also comprise staff members' contributions to the pension fund.

The group contract was concluded on 5 April 1974 for a duration of one year and could be extended by tacit agreement or amended. The contract provided that the premium rates would be subject to annual adjustment. This adjustment is calculated taking into account the reimbursement costs incurred by the insurers during the preceding years.

4. The contract had been amended several times on the occasion of the successive annual renewals up to 1996. The ESO governing bodies subsequently requested the Administration to renegotiate the contract with the insurers with a view to obtaining a 20 per cent reduction in the annual premium.

At the end of 1997, after discussions which commenced in March 1997, the ESO and Van Breda reached an agreement on the essential terms of a new contract and decided, by an exchange of letters of 23, 29 and 30 December 1997, to set the date for the coming into force of the new contract as of 1 January 1998.

The above contract contained provisions relating, in particular, to the new scheme for the coverage of insured staff members, i.e. the level of benefits and reimbursements. On some points requiring the clarification of issues of a technical and administrative nature, it was agreed between the parties that the final contractual formulations would be adopted at the beginning of 1998.

The staff of the ESO was informed by an internal memorandum of 29 December 1997 that the new reimbursement scheme would enter into force on 1 January 1998.

The new contract was signed by the ESO on 18 March 1998 and by Van Breda on 23 April 1998.

5. The complainant received a salary statement on 16 March 1998 which, for the first time since 1 January 1998, bore the indication "salary adjusted due to: new health [insurance] rates". He considered that this constituted the first individual decision in his case of the application of the new health insurance system. On 14 May 1998, he lodged an internal appeal against this salary statement.

6. By a letter of 25 May 1998, the Head of Administration informed the complainant that his appeal had been dismissed by the Director General, who considered that it had not been lodged within the required time limit for internal appeals.

This letter of 25 May is impugned in the complaint filed with the Tribunal on 18 August 1998.

7. The complainant contends that the impugned decision is unlawful on the grounds that the salary statement for March 1998 constitutes a measure applying a decision which was not in force at the date of the notification of the above measures.

He also submits that the impugned decision is unlawful because it was in breach of the general principle that detrimental administrative decisions may not have retroactive effect. He says that a decision which came into effect on 23 April 1998, the date of the signature of the contract by Van Breda, which was therefore only applicable from the month of May, was in fact applied in the previous months.

8. The complainant argues that the new contract was concluded on 23 April 1998, the date on which it was signed by Van Breda, and that it could not therefore come into force before that date, nor be applied to situations before that date.

The Tribunal does not agree with the complainant. A contract is concluded when there is a firm and definitive unity of intentions between the contracting parties; it generally takes the form, particularly where, as in this case, it consists of a contract by correspondence, of an offer made by one party followed by the acceptance of the offer by the other party.

Such unity of intentions must in principle cover all the clauses of the contract, which did not happen in the present case. But in certain instances, the contract may be held to be concluded, by interpretation of the intentions of the parties, even in the absence of agreement on the subsidiary points.

The intention of the parties, the ESO and Van Breda, to consider the essential points of the new contract as being concluded by exchange of correspondence has been clearly established. The parties were within their rights to set 1 January 1998 as the date for the coming into force of the contract. It only remained to clarify certain points of a technical and administrative nature, which could not jeopardise the essential provisions relating to the new insurance scheme for staff members and the premium rates to be paid. The contract must be presumed to have been concluded at the latest on 30 December 1997, the date on which Van Breda acknowledged receipt of the ESO's acceptance of the offer.

This contract, concluded prior to 1 January 1998, could enter into force on that date in respect of the essential provisions agreed upon between the parties.

The personnel of the ESO was duly informed so that it would be aware of the reimbursement scheme which would be applied in 1998 and the premium rates which it would have to pay as of 1 January 1998.

It matters little, as emphasised by the Observatory, that the written confirmation from Van Breda reached the ESO only on 30 December 1997, that is one day after the distribution of the internal memorandum informing the personnel of the new system which would come into force on 1 January 1998. The ESO, which had accepted an offer made by the insurance brokers Van Breda on 29 December 1997, was entitled to consider that the latter's confirmation was assured.

9. It cannot, therefore, be argued that the salary statements for March and April 1998 constitute measures applying a decision which was not yet in force. In practice, these salary statements were drawn up taking into account an insurance contract which came into force on 1 January, in accordance with the intentions of the contracting parties. The provisions of the contract had been previously brought to the knowledge of staff members of the ESO.

Nor can it be claimed that the application to staff members in March 1998 of the provisions of a contract which entered into force on 1 January 1998 is in breach of the general principle that detrimental administrative decisions may not have retroactive effect.

The claims having failed on the merits, it is not necessary to rule on the ESO's plea of irreceivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Dekker (No. 3)** **Judgment 1917**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Hans Dekker against the European Southern Observatory (ESO) on 28 September 1998 and corrected on 23 December 1998, the ESO's reply of 15 March 1999, the complainant's rejoinder of 2 July and the Observatory's surrejoinder of 26 August 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career and some of the material facts of the case are set out under A in Judgment 1916, delivered on this day on the complainant's second complaint.

When he learnt that the new health insurance contract concluded by the ESO and its insurers had only been signed by representatives of the insurers – the insurance brokers Van Breda – on 23 April 1998, the complainant filed a second internal appeal with the Director General. The internal appeal, dated 3 July, was against the application in his case, of the decision to amend the health insurance scheme, as reflected in his salary statement for the month of May 1998. In a letter of 7 July 1998, which is the impugned decision, the Head of Administration replied to him, on behalf of the Director General, that the second internal appeal was not receivable as it repeated the same points of substance as the first and a decision had already been reached on them.

B. Based on the case law of the Tribunal, the complainant contends that the impugned decision is in breach of his acquired right to safeguard his conditions of employment. He argues that the financial situation of the health insurance scheme did not warrant the adoption of the amendments resulting in the reduction of insurance coverage, and particularly the introduction of a reimbursement rate of 80 per cent for pharmaceutical expenses. He says that the ESO was merely seeking budgetary savings.

The complainant requests the Tribunal to set aside the Director General's decision of 7 July 1998 and to grant him all consequent redress and costs.

C. In its reply, the Observatory contests the receivability of the complaint. At the end of 1997, the complainant received the memorandum of 29 December 1997 informing him that the new reimbursement scheme would come into force on 1 January 1998. This general decision was applied to him for the first time in January 1998 on the occasion of the payment of his salary. It asserts that the complainant's internal appeal, dated 3 July, was therefore not lodged within the statutory time period of sixty days. His complaint is consequently not receivable under Article VII of the Statute of the Tribunal.

The ESO and the insurance brokers Van Breda reached agreement on the essential points of the contract at the end of 1997. They were therefore bound by a contract on 1 January 1998, since a contract is concluded when the parties reach agreement on the points which they consider to be essential.

Based on the case law of the Tribunal, the Observatory argues that there is no impairment of an acquired right "if the reduction of a benefit is set off by a corresponding advantage". In the present case, the reduction in the reimbursement rate for certain items is offset by the introduction of an additional reimbursement and a decrease in the annual premium for 1998.

The ESO adds that the complainant confines himself to general criticisms of the new health insurance scheme which, moreover, "has remained unchanged in principle".

Citing the case law once again, the Observatory contends that the costs and benefits of the health insurance contract do not constitute an acquired right, since they depend on variables.

In the same way as many countries, including Germany, the ESO has reduced the reimbursement rate with a view, among other objectives, to "enhance the awareness" of the staff of the cost of pharmaceuticals and thereby avoid unnecessary expenses.

D. In his rejoinder, the complainant contends that the complaint is receivable. He argues that the new contract only acquired binding force on 23 April 1998, the day it was signed by Van Breda. His salary statement for May 1998 therefore constituted the first application, in his case, of the new health insurance scheme.

He admits that he has only offered an "overall assessment" of the new health insurance scheme, but submits that the compensation mechanisms described by the ESO are not sufficient to make up for the "substantial deterioration" in comparison with the previous scheme. He fears that the "very principle" of health insurance has been prejudiced.

E. In its surrejoinder, the Observatory says that, over a period of one year, the reduction in the reimbursement rate can only affect the complainant within a limit of 1.6 per cent of his accumulated annual basic salary.

CONSIDERATIONS

1. The material facts are set out in Judgment 1916 (*in re* Dekker No. 2), delivered on this day, to which the Tribunal refers.

2. For the present complaint, the material facts may be summarised as follows:

When he learnt that the new insurance contract between the insurers represented by Van Breda and the ESO had only been signed on 18 March 1998 by the Observatory and 23 April by Van Breda, the complainant deduced that the new health insurance scheme for 1998 could only have come into force as of 23 April 1998, the date on which he considers that the parties accepted the new contract.

He therefore contends that the first salary statement issued by the ESO after the date of signature of the insurance contract, that is the salary statement for the month of May 1998, constituted in practice the first individual decision of application in his case of the new health insurance system.

On 3 July 1998, he filed a second internal appeal. He challenged the individual decision in his case constituted by the salary statement for the month of May 1998 in order, he said, to safeguard his rights for the future.

On 7 July 1998, this internal appeal was dismissed by the Director General on the grounds that it was not lodged within the time limit for internal appeals. It is this decision which is being impugned before the Tribunal.

3. The complainant contends that the impugned decision is unlawful because it violates his acquired rights to the safeguard of his conditions of employment. He considers that the substantial changes in the health insurance scheme and the detrimental effect that they will have on the benefits provided by the ESO would, from a financial point of view,

negatively affect his contract of employment or impair the fundamental terms in consideration of which he accepted his appointment in the ESO.

4. It should be recalled, in the first place, that Article R V 1.01 of the Staff Regulations provides that the social security scheme shall include a health insurance scheme agreement approved by the Council of the ESO safeguarding staff members against the economic consequences of illness and accidents.

Article R D 2.01 of the Staff Regulations places the obligation on the ESO to insure staff members against the contingencies of occupational illness and occupational accidents.

5. With regard to acquired rights, the Tribunal has applied a constant case law since Judgment 986 (*in re* Ayoub No. 2 and others), namely that:

> "international officials may allege breach of an acquired right when there is impairment of an essential and fundamental term of conditions of employment; and that is so even where impairment is gradual and due to an accretion of final decisions which are no longer open to challenge and each of which, taken singly, would not itself have been deemed unlawful" (see Judgment 1514 *in re* Aymon No. 2 and others, at 12).

6. The complainant argues that the condition of employment consisting of a health insurance scheme governed by the Staff Rules and Regulations and the insurance contract concluded by the Administration are of an essential and fundamental nature and that the amendment of the contract to the detriment of staff members, without their consent, was such as to affect negatively from a financial point of view their contracts of appointment or impair their fundamental conditions of employment.

He contends that the financial situation of the Observatory's health insurance scheme was not such, in the circumstances, as to justify the substantial amendments made to the health insurance contract and that the Administration's actions were guided by considerations alien to the management of the Observatory's health insurance scheme.

Finally, the complainant submits that the new insurance scheme purely and simply reduces the insurance coverage available to staff members and therefore constitutes a significant breach of their legitimate right to the safeguarding of their conditions of employment.

7. The Tribunal observes that, since 1974, the health insurance contract has always been concluded for a period of one year. It could have been either tacitly renewed or amended. Indeed, it had been amended on several occasions.

The complainant has no absolute claim to a specific system of health insurance.

There is no evidence whatsoever that the new insurance system has the effect of substantially reducing the benefits available to him or of consequently impairing essential and fundamental aspects of his terms of appointment.

8. It may be deduced from the above that the complainant does not produce evidence of the impairment of his acquired rights, as they are admitted by the Tribunal (see 5 above).

9. The claims fail on the merits and it is therefore not necessary to rule on the Observatory's plea of irreceivability.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Palma (No. 6)**

Judgment 1918

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 27 June 1998, the ESO's reply of 24 August, the complainant's rejoinder of 7 September and the Observatory's surrejoinder of 21 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1948, was a member of the staff of the ESO from 1 September 1989 to 31 August 1995. Other material facts and information on his career are set out in Judgment 1665 of 10 July 1997 on the complaint which he filed against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

By a letter of 17 February 1998, the complainant requested the Director General of the ESO to disclose and deliver to him copies of any correspondence concerning him which had been exchanged by the ESO and CERN since 7 July 1995, the date on which the Rehabilitation Board met. He received no reply. On 14 April 1998, he lodged an internal appeal with the same objective. Having received no reply within the period of sixty days which he gave the Director General to answer, he states that he is challenging the "implied negative decision" concerning his appeal.

B. The complainant refers in particular to the International Labour Organization's Medical Care and Sickness Benefit Convention, 1969 (No. 130), and the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159). He contends that there was collusion between CERN and the ESO to deny him his rights to health and work, in violation of basic principles of law. He submits that the manner in which the ESO "passed the ball" to CERN proves the existence of hidden correspondence concerning an agreement between these two organisations.

He requests the Tribunal to quash the implied negative decision which he is impugning, to order the disclosure and delivery of the requested documents, and to grant him costs.

C. In its reply the ESO denies any collusion. It argues that the complainant does not allege an infringement of the terms of his contract of employment nor the provisions of the ESO Staff Regulations, as required under Article II, paragraph 5, of the Statute of the Tribunal. It submits that the Tribunal is not competent to order the disclosure of documents. It contends that staff members, and *a fortiori* former staff members, do not have access to files other than their personal administrative file. The complainant consequently has no right to obtain the information requested.

D. In his rejoinder the complainant takes the ESO to task for its bad faith and accuses it of endeavouring to obstruct justice. He argues that he can invoke in his complaint a breach of the general principles of law and refers to Article I 3.07 of the International Staff Rules regarding the ESO's obligation to protect staff members. He accuses the Director General of having failed in his duty by not convening the Joint Advisory Appeals Board.

E. In its surrejoinder the Observatory reaffirms its arguments and says that the documentation which the complainant is seeking does not exist.

CONSIDERATIONS

1. The complainant entered the staff of the ESO on 1 September 1989 under a fixed-term contract. In a letter of 26 January 1995, the Head of Personnel informed him that the Director General had decided not to renew his contract when it expired on 31 August 1995.

2. In 1994, while he was working at the ESO, the complainant suffered a loss of vision in his left eye. In July 1995, the ESO Rehabilitation Board set the "degree of disability" and the loss of earning capacity at 39 per cent. The CERN Pension Fund initially accorded him an "unsuitability pension" and then, after an internal appeal, "*ex gratia* benefits equal to a partial incapacity pension of 40 per cent". Other material facts and information on the complainant's career are set out in Judgments 1665, 1718 and 1843,

3. In a letter of 17 February 1998, the complainant requested the Director General to disclose and deliver to him a copy of any correspondence concerning him which had been exchanged between the ESO and CERN since the meeting of the Rehabilitation Board on 7 July 1995. This letter remained unanswered.

4. The complainant lodged an internal appeal with the Director General on 14 April 1998 and, having received no reply, filed the present complaint on 27 June 1998 under Article VII, paragraph 3, of the Statute of the Tribunal.

5. In the material case, the complainant is seeking the disclosure of certain documents by the Observatory. He argues that he has the right to their disclosure and that the Observatory has the duty to produce them. This claim, to be admissible, must have a basis in law, which means that the complainant must indicate precisely the legal provisions which he is using in support of his claims. In this respect, the complainant bases his pleas on ILO Conventions Nos. 130 and 159 and the United Nations Charter. He also invokes Article I 3.07 of the International Staff Rules of the ESO and general principles of law.

None of the legal provisions invoked by the complainant confer upon him the right which he wants the Tribunal to recognise.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Palma (No. 7)** **Judgment 1919**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 27 June 1998, the ESO's reply of 21 September, the complainant's rejoinder of 17 October and the Observatory's surrejoinder of 10 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian born in 1948, served on the staff of the ESO from 1 September 1989 to 31 August 1995. Information on his career and other material facts are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN), in Judgment 1718 of 29 January 1998 on his first complaint against the ESO and in Judgment 1785 (*in re* Palma No. 2) of 28 January 1999.

On 28 June 1995, the complainant was informed of the decision to place him on special leave with immediate effect while an investigation was conducted into an allegation of fraud against him. He had to leave the Observatory's premises immediately. The ESO asserts that no disciplinary measures were taken in the case because the complainant's fixed-term contract was coming to an end.

By a letter of 18 February 1998, the complainant requested the Director General of the ESO to disclose to him copies of any documents concerning the investigation conducted in July and August 1995. He received no reply. On 14 April 1998 he lodged an internal appeal with the same objective. Having received no reply within the period of sixty days which he had given the Director General to answer, he states that he is contesting the "implied negative decision" concerning his appeal.

B. The complainant contends that the requested documents would prove that he had committed no fault. His placement on special leave was, therefore, unlawful and the implementation of that decision was in breach of his fundamental rights; he refers in particular to those set out in the Universal Declaration of Human Rights. He accuses the Head of Contracts and Procurement, the Head of the Personnel Department, the Head of Administration and the Director General of having condemned him to "exile".

He requests the Tribunal to set aside the impugned implicit decision, order the disclosure and delivery of the requested documents and grant him costs.

C. In its reply the Observatory argues that the complainant does not allege an infringement of the terms of his contract of employment nor the provisions of the ESO Staff Regulations, as required by Article II, paragraph 5, of the Statute of the Tribunal. It submits that the Tribunal is not competent to order the discovery of documents.

It contends that staff members, and *a fortiori* former staff members, do not have access to files other than their personal administrative file. The complainant consequently has no right to obtain the information requested.

It adds that the complainant never challenged the decision of 28 June 1995 to place him on special leave and that he is now time-barred from doing so.

D. In his rejoinder the complainant asserts that the ESO's statement, that no disciplinary measures were taken in his case in view of the termination of his contract, is a lie. The fact that the Observatory offered on 30 June 1995 to pay him all the indemnities to which he was entitled upon the termination of his contract proves, in his view, that the allegations of fraud were not well-founded. He takes the ESO to task for its bad faith and accuses it of endeavouring to obstruct justice. He refers to Article I 3.07 of the International Staff Rules regarding the obligation of the ESO to protect staff members. He accuses the Director General of failing in his duty by not convening the Joint Advisory Appeals Board. Finally, he expresses the view that the issue of the receivability of his complaint does not arise, since the acting Head of Administration informed him on 28 July 1995 that he could not appeal against a disciplinary measure which had not been taken.

E. In its surrejoinder the Observatory submits that the legal issue raised in the present complaint has already been submitted for review by the Tribunal in the complainant's second complaint. It denies that the acting Head of Administration discouraged the complainant from appealing. Finally, it asserts that the requested documentation does not exist.

CONSIDERATIONS

1. The complainant entered the service of the ESO on 1 September 1989. His first contract, of a duration of three years, was followed by another, also for three years, which expired on 31 August 1995. The Head of Personnel informed him, in a letter of 26 January 1995, that his contract would not be extended beyond 31 August 1995.

2. The Tribunal, in Judgment 1665 (*in re* Palma) under 10, found that the complainant had not challenged that decision and that he was, therefore, time-barred from doing so.

3. On 28 June 1995 the Observatory decided to place the complainant on special leave with immediate effect while an investigation

was conducted into an allegation of fraud against him. This decision was not challenged by the complainant.

4. In a letter of 18 February 1998 the complainant requested the Director General to provide him with a copy of any documentation concerning the above investigation. This letter remained unanswered.

5. On 14 April the complainant lodged an internal appeal with the Director General and, having received no reply, filed the present complaint on 27 June 1998 under Article VII, paragraph 3, of the Statute of the Tribunal. He requests the Tribunal:

(a) to quash the implied decision to dismiss his internal appeal and to order the Observatory to disclose and deliver all the documentation requested;

(b) to order the reimbursement of a fair and adequate amount in costs.

6. The Tribunal observes that the complainant's claims are identical to those covered by a previous complaint, which was dismissed in Judgment 1785 (*in re* Palma No. 2). The complainant has no grounds for challenging a decision which is *res judicata*.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

EIGHTY-EIGHTH SESSION

***In re* Abdul-Quader**
(Application for interpretation
and execution)

Judgment 1920

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation and execution of Judgment 1629 (*in re* Schopper) filed by Mr Abu Saleh Abdul-Quader on 20 January 1999, the reply of 9 April from the World Health Organization (WHO), the complainant's rejoinder of 4 June and the WHO's surrejoinder of 30 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for interpretation and execution of Judgment 1629. The complainant was an intervener in that case and, having been found to be in the same position in law and in fact as Miss Schopper, was entitled to benefit from that judgment, save as to costs.

2. The complainant alleges unjustifiable delay in the execution of Judgment 1629. Like Miss Schopper and Mr Friel (in Judgments 1904 and 1905 of this day) he claims that he, too, was entitled to payment of contributions by the WHO to the United Nations Joint Staff Pension Fund

and the Staff Health Insurance. Like Mr Friel, he claims that compensation should be paid to him for the loss of home leave.

3. The question of excessive delay was raised in Judgment 1797 (*in re* Weiss No. 2). The reduction-in-force procedure and reassignment exercise following Judgments 1624 to 1631 were considered by the Tribunal which held under 11 that it was satisfied that the Organization acted with reasonable speed in carrying out the large exercise called for by the judgments relating to staff of the Global Programme on Aids (GPA).

4. In Mr Weiss's case, that complainant was informed on 16 April 1998 that he could not be reinstated and would get an award of damages instead. He was sent a detailed reckoning of damages on 15 June and on 13 July 1998 the amount was paid into his account with interest. The Tribunal held that he was compensated by the payment of interest and no further compensation was due on the grounds of delay.

5. In the present case, the complainant was told on 15 April 1998 that he would not be reinstated and would get an award of damages. He was asked to supply details of any indemnity or earnings with appropriate documentation. On 11 May 1998 he supplied some details but was requested on 1 July 1998 to supply copies of all pay slips showing dates, periods and amounts, not just a cumulative total. He was asked for original school bills and evidence of payment of those bills and his rent bills. He replied on 31 August 1998 and, after a request for further clarification on 28 October he supplied additional documentation on 23 November 1998.

6. The complainant's counsel wrote to the WHO on 31 December 1998 and again on 8 January 1999 asking for a statement of the amount to be paid to the complainant. In the absence of a reply this complaint was filed on 20 January 1999.

7. A letter was sent to the complainant on 10 February 1999 stating the amounts to be paid and requesting information on the mode of payment. Having received this information on 19 February, instructions

for payment were issued on 26 February and the money was paid on 5 March 1999.

8. The delay in paying the complainant was much longer than for Mr Weiss, but the complainant did not supply all the information at the start and had to be requested more than once to produce documents. The delay was not all on the Organization's side.

9. In his rejoinder the complainant drops his claim for relief relating to the delay but asks the Tribunal to conclude he was justified in initiating the present complaint. He maintains his claim to costs under this head.

10. In the circumstances, the Tribunal considers that the WHO's delay in replying to the complainant's letter of 23 November 1998, despite reminders of 31 December 1998 and 8 January 1999, did provide justification for filing the complaint on 20 January. Even though there is no question of further compensation the complainant is entitled to a sum for costs.

11. For the reasons set out in Judgment 1904 (*in re* Schopper No. 2) the complainant fails in his claim to be entitled to payment of contributions by the Organization to the Pension Fund and Staff Health Insurance.

12. The complainant suggests that the arguments advanced in his case are different from those in the case of Mr Weiss. He asks that the issues discussed be examined *ab initio*. He claims that Judgment 1629 required the Organization to treat the complainant – an intervener – as remaining in service until the reduction-in-force procedure was completed. This entailed paying contributions to the Pension Fund and Staff Health Insurance until that period expired.

13. The complainant is mistaken. The arguments may differ but the principle is the same. Judgment 1629 gave the option to the Organization either to reinstate or to pay damages. Where damages were paid there was no reinstatement and therefore no question of paying the claimed contributions.

14. The complainant asks the Tribunal to give the option to the Organization to find an alternative solution regarding the payment of health insurance. The Tribunal holds that there are no grounds for allowing this request.

15. In relation to home leave entitlement, the complainant says he went on home leave in December 1994 and would have been entitled again in December 1996. He says that he did in fact travel for home leave purposes in December 1995-January 1996 and in December 1996-January 1997. He claims one set of travel costs.

16. The Organization paid for his home leave in 1994-1995 and says that the earliest possible time for his next leave, if he had been a staff member, would have been December 1996. However, since he was separated on 31 May 1996 he was not entitled to home leave after that date.

17. The Tribunal accepts this and the claim fails.

18. The complainant claims 3,000 Swiss francs in costs. The Tribunal awards him a partial payment of 1,500 francs.

DECISION

For the above reasons,

1. The complainant is entitled to 1,500 Swiss francs in costs.
2. All his other claims are dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

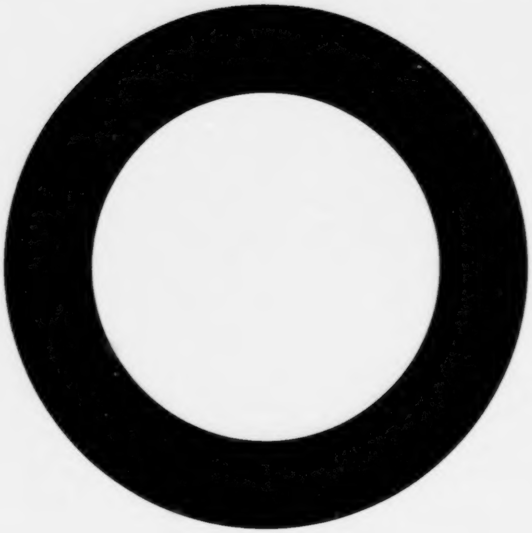
Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA



EIGHTY-EIGHTH SESSION

***In re* Zaunbauer (No. 2)**
(Application for execution)

Judgment 1921

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the execution of Judgment 1782 filed by Miss Christl Zaunbauer on 22 March 1999, the reply of 2 July from the United Nations Industrial Development Organization (UNIDO), the complainant's rejoinder of 13 August and UNIDO's surrejoinder of 15 October 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant seeks full execution of Judgment 1782 delivered on 9 July 1998.

2. The complainant's appointment as a staff member of UNIDO was prematurely terminated on 28 June 1996 as a result of the Organization's substantial downsizing at that time. The Tribunal found the decision to terminate the complainant's appointment to be flawed, and in Judgment 1782 quashed it. The Tribunal then ordered reinstatement but "only up to January 1998, the month in which she qualified for early retirement". The Tribunal ordered that she be paid full arrears of salary, allowances and other benefits less any severance payments and occupational earnings she may have had. Before going on to deal with the

questions of damages and costs, the Tribunal specifically ordered also that the complainant "shall be deemed for all purposes to have left on early retirement in January 1998 and be entitled to all benefits due upon such retirement".

3. It is manifest that in the quoted sentence the Tribunal was referring to UNIDO's voluntary separation programme which came into effect in January 1998. That programme offered significant benefits in the form of a "golden handshake" to long-term employees, such as the complainant had been, who voluntarily took early retirement.

4. In its execution of Judgment 1782 UNIDO, while paying all other sums due, has refused to give the complainant the monetary and other benefits she would have received if she had still been in its employ on 9 January 1998, when the programme was announced, and had then left voluntarily. While it does not dispute that she would otherwise have qualified for the voluntary separation programme it says she was not eligible since she did not apply to participate in it between 9 and 31 January 1998, the limit dates, and she did not have the approval of the Director-General to take early retirement in accordance with the programme.

5. These arguments are untenable. The complainant did not apply to take part in the voluntary separation programme between the limit dates because she could not; she had already been terminated by the Organization's own illegal actions as of 28 June 1996. The Organization simply cannot be heard to say that it did not approve the complainant's voluntary early retirement as of January 1998 when it had already improperly got rid of her.

6. It should be noted that paragraph 2 of UNIDO/DGB(M).78 bulletin dated 9 January 1998 describing the voluntary separation programme specified as follows:

> "The conditions set out in this bulletin will apply equally to all staff members whose request for a voluntary separation has been accepted. No individual staff member will receive payments or benefits that will not also be granted to others

> under this programme who find themselves in a similar factual and legal position."

The Tribunal holds that the Organization's own misconduct cannot be an excuse for not treating the complainant on the same basis as her fellow employees.

7. The terms of Judgment 1782 are clear and brook no pettifogging interpretation. The complainant was "deemed for all purposes" to have taken early retirement in January 1998 and to be "entitled to all benefits due upon such retirement". The voluntary separation programme sets out these benefits and the complainant was and is entitled to them.

8. The Tribunal will order again that the Organization do what it was ordered to do on 9 July 1998. All monetary sums due to the complainant shall bear interest from the latter date at 8 per cent per annum to the date of payment. The Organization shall also pay the complainant's costs in the amount of 2,000 United States dollars.

DECISION

For the above reasons,

1. The Organization is ordered to grant the complainant all the benefits that she would have received had she taken voluntary early retirement in accordance with the Organization's voluntary separation programme. All sums of money payable to the complainant pursuant hereto shall bear interest at the rate of 8 per cent per annum from 9 July 1998 to the date of payment.
2. The Organization shall pay the complainant's costs in the amount of 2,000 United States dollars.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Tueni (No. 2)**
(Application for execution)

Judgment 1922

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the execution of Judgment 1772 filed by Mrs Ariane Elisabeth Tueni on 24 March 1999 and corrected on 26 April, the reply of 4 August from the United Nations Industrial Development Organization (UNIDO), the complainant's rejoinder of 17 September and UNIDO's surrejoinder of 29 October 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant seeks the execution of Judgment 1772 delivered on 9 July 1998. The case is in virtually all respects, except for irrelevant details, identical to Miss Christl Zaunbauer's second case, which has led to Judgment 1921 also delivered this day.

2. The complainant was born in February 1943. She joined the staff of UNIDO in January 1973 and in June 1996 her employment was terminated. In Judgment 1772 the Tribunal found the Administration's action to have been flawed. It ordered that the complainant be reinstated but only up to February 1998 the month in which she qualified for early retirement. The reason for that limitation was that the Organization had put in place in January 1998 a voluntary separation programme offering

extremely generous benefits to employees who, having reached age 55 and having 25 years of service, agreed to take early retirement. The complainant would have qualified for this programme in February 1998.

3. In Judgment 1772 the Tribunal took care to specify that the complainant was to be entitled to all benefits upon her early retirement in February 1998. The Organization, however, refuses to give her the benefits of the voluntary separation programme on the wholly specious ground that it was not in effect at the time she was improperly terminated in June 1996 and that she was not an employee, and therefore not eligible, when the programme came into effect in 1998. As in *in re* Zaunbauer No. 2 this is a clear case of a defendant attempting to plead its own wrongdoing and is not to be tolerated.

4. The Tribunal will order the Organization to execute Judgment 1772 and to grant to the complainant all the benefits to which she would have been entitled under the voluntary separation programme if she had taken early retirement in February 1998. All monetary payments shall bear interest at the rate of 8 per cent per annum as from 9 July 1998. UNIDO shall also pay the complainant's costs in the amount of 2,000 United States dollars.

DECISION

For the above reasons,

1. The defendant is ordered to pay the complainant all the benefits to which she would have been entitled under the voluntary separation programme if she had taken early retirement in February 1998. All sums due shall bear interest at 8 per cent per annum as from 9 July 1998.
2. The defendant shall pay the complainant's costs in the amount of 2,000 United States dollars.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Kogelmann (No. 5)**
(Application for execution)

Judgment 1923

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1640 filed by Miss Edith Kogelmann on 13 January 1998 in the form of a brief from her counsel regarding the unsettled legal costs and other issues relating to her entitlements in her case against the International Atomic Energy Agency (IAEA), the Agency's reply of 20 March 1998, its further comments of 23 June 1998 on the answers which Miss Kogelmann's counsel provided to questions put to him by the President of the Tribunal in connection with her legal costs, the order dated 13 November 1998 from the President concerning those costs, the complainant's rejoinder of 22 June 1999 and the Agency's surrejoinder of 30 August 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This application concerns the non-execution of point 5 of the decision in Judgment 1640 which was delivered on 10 July 1997.

2. Before taking up the submissions on that matter the Tribunal will dispose of the submissions contained in the same brief relating to an application for the payment of legal fees which were dealt with in point 1 of the decision of that judgment. That point provides:

> "The Agency shall pay the complainant the legal costs that she incurred and that were necessitated by the interlocutory order in Judgment 1373, the amount to be approved by the President of the Tribunal failing agreement between the parties."

3. The President issued an order in respect of those costs, and only those costs, on 13 November 1998.

4. The Agency submits that the President made a ruling thereby disposing of all the issues raised in the submissions and so they are *res judicata*.

5. The jurisdiction of the President was limited to approving the amount of legal costs in the absence of agreement between the parties. Therefore, there is no question of the issues raised in the brief of 13 January 1998 (other than the matter of costs) being disposed of other than by a ruling of the Tribunal.

6. Turning to the substantive claim, the complainant holds that the Agency has not fully executed point 5 of Judgment 1640. That point provides:

> "The Agency shall grant her any pay entitlements and [Temporary Disability Insurance Plan] benefits arising out of her reinstatement in [sick leave] status, plus interest to be reckoned at the rate of 8 per cent a year from the due dates and up to the date of payment."

The complainant says that she was on sick leave with no pay from 26 September 1992 to 31 March 1993.

7. The complainant paid 197,507 Austrian schillings to obtain entitlement to a full pension. The Agency refunded only 90,169 schillings to her which corresponds to her share of the contributions. She is claiming a refund of the Agency's share for the period from 26 September 1992 to 31 March 1993.

8. The complainant was paid a one-month end-of-service allowance in December 1997, with interest calculated over a 53-month period – from August 1993 to the date of payment. She claims that the interest should have been calculated over a 57-month period – from 31 March 1993 which

was her last day for pay purposes. She also claims that the same calculation should be made for interest relating to pension and health insurance contributions.

9. At the time of her separation, before Judgment 1640 was issued, the complainant was required to pay 10,986 schillings for the health insurance which is administered by the company Van Breda. The Agency repaid her 4,929 schillings on the basis that she was not entitled to reimbursement of any amounts after 25 September 1992. She claims that she is entitled to reimbursement of the contributions paid to Van Breda from 26 September 1992 to 31 March 1993.

10. No annual leave was credited for periods of sick leave with half pay or special leave with no pay. The complainant calculates that between 1 May 1992 and 31 March 1993 she accrued 27.5 days of annual leave. The Agency granted her 4.5 days, leaving 23 days for which she claims payment with interest.

11. The Agency states that following Judgment 1640 the complainant was placed on sick leave as of 18 April 1992. It recalculated her leave in accordance with Staff Rule 7.04.1(B)(3) under which she was entitled to nine months of sick leave on full pay and up to nine months on half pay in any period of four consecutive years and also in accordance with Rule 7.03.1(B) under which special leave without pay may be granted to a staff member "for purposes normally covered by sick or annual leave when such leave has been exhausted". Her entitlement to sick leave with half pay expired on 9 August 1992. But, by applying Rule 7.04.1(B)(3) which provides for the reckoning of sick leave over rolling periods of four years, it was calculated that she had a further entitlement to sick leave with full pay from 10 August to 25 September 1992. Accordingly, the complainant was placed on special leave without pay from 26 September 1992 to 31 March 1993.

12. Rule 7.03.1(C) provides that a staff member "shall not accrue service credits" towards sick leave, annual leave, home leave, maternity leave, salary increments, termination indemnity, repatriation grant, end-of-

service allowance and other service benefits during full months of special leave without pay. Therefore, a staff member must pay both the Agency's and his or her own share of the contributions to the United Nations Joint Staff Pension Fund. The amount of 107,338 schillings represents the full contribution to the Pension Fund for the period of special leave without pay (26 September 1992 to 31 March 1993) and no part of that sum is refundable. Similarly the Agency's share of the contributions towards health insurance for the same period is not refundable and the entire cost must be borne by the complainant.

13. Rule 7.04.1(D) provides:

> "Staff members shall not accrue service credits towards annual leave and sick leave during sick leave on half-pay unless they request that the portion of each day which would otherwise be without pay be charged to their entitlement to accrued annual leave."

In accordance with this provision no annual leave accrued during the period when the complainant was on sick leave with half pay. Also, in accordance with Rule 7.03.1(C) referred to above, annual leave cannot accrue during a period of special leave without pay.

14. With regard to interest on the one-month end-of-service allowance, the Agency claims that the payment of a staff member's final entitlement is subject to the completion and submission of a clearance certificate. The complainant signed one on 14 July 1993 and payment was made to her on 30 July 1993. Interest on the one-month end-of-service allowance was therefore rightly calculated from the date when the final payment was made, as was any other interest due to her.

15. In her rejoinder the complainant submits that the Agency is not entitled to apply the rule relating to special leave without pay unless it also applies the rule which states that where termination is contemplated for a staff member close to retirement, he or she may be placed on special leave without pay after having exhausted sick leave entitlements provided that a disability payment is payable (Administrative Manual part II, section 7, paragraph 4).

16. The Agency refers to the fact that prior to Judgment 1640 the complainant was considered to be on special leave without pay from 21 April 1992 to 31 March 1993. Her sick leave status was reviewed in accordance with that judgment. Under paragraph 4 of annex 1 to part II, section 7, of the Administrative Manual a staff member may be entitled to disability pay while on special leave without pay but this provision applies only in cases of termination for health reasons under paragraph 3(iii) of the same annex. Such a termination was never envisaged in the complainant's case. Her contract was never terminated. She retired on reaching the usual age.

17. The Tribunal accepts the Agency's submissions in respect of all the complainant's claims and accordingly the application for execution of Judgment 1640 is dismissed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Ortiz Rodriguez** **Judgment 1924**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Jose Luis Ortiz Rodriguez against the United Nations Industrial Development Organization (UNIDO) on 11 November 1998 and corrected on 7 December 1998, UNIDO's reply of 19 March 1999, the complainant's rejoinder of 26 April, his additional submission of 7 June and the Organization's surrejoinder of 5 August 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born on 12 February 1944 and is of Guatemalan nationality. He joined the staff of UNIDO in 1980 as an industrial development officer at grade P.3 and was promoted to grade P.4 in 1985. He served in the Programme for Latin America and the Caribbean of the Country Strategy and Programme Development Division. At the material time he held the post of area programme officer.

In 1995 UNIDO introduced a two-phase staff reduction programme. The first phase consisted of a voluntary separation programme and the second phase, announced by bulletin UNIDO/DGB(M).5 of 16 January

1996, involved non-voluntary measures. A joint body called the Advisory Group on Human Resource Planning was established for the purpose of making recommendations to the Director-General for the retention or separation of staff members. By a memorandum dated 23 February 1996 the new Managing Director of the Country Programmes and Funds Mobilization Division informed the complainant that his post was to be abolished. The Advisory Group carried out a review of his situation but was unable to identify a suitable post for him. Its initial proposal notified to him on 20 May was to recommend to the Director-General that the complainant's appointment be terminated on 21 June 1996.

The complainant having informed the Advisory Group that he would accept a field assignment, the Director of Personnel Services wrote to him on 25 June 1996 telling him that the Director-General had decided to extend his appointment to 31 August so that his application for field posts could be considered. By a memorandum of 30 August 1996, the Director of Personnel Services informed the complainant that his contract was extended for a further two months, but that his appointment would be terminated on 31 October 1996 if no suitable position could be identified for him in the meantime. On 20 September the Director confirmed the termination of his appointment under Staff Regulation 10.3(c) as from 30 October 1996. The complainant received a termination indemnity under Regulation 10.6(a).

On 16 October the complainant asked the Director-General to review his decision but a letter of 11 December 1996 from the Director of Personnel Services informed him that it was maintained. On 10 February 1997 the complainant appealed to the Joint Appeals Board. The Board found in his favour, recommending in its report of 14 July 1998 that he should be reinstated, or alternatively that a mutually acceptable agreement should be negotiated with the complainant, such as his being placed on special leave without pay from the date of separation until the age of fifty-five, with payment by UNIDO of his pension fund and health insurance contributions.

On 18 August 1998 the Director-General addressed a memorandum on the complainant's case to the secretary of the Joint Appeals Board saying "while reinstatement is not currently possible due to the lack of suitable posts, efforts should be made to find an alternative settlement which would be mutually acceptable".

An offer was made to him by the Chief of the Entitlements and Social Security Section in a letter dated 16 October 1998, proposing inter alia that he should be put on special leave without pay from 12 November 1996 to 28 February 1999 when he would reach early retirement age. The complainant replied on 22 October setting out different terms for a settlement. He asked in particular to be put on special leave with full pay from the date of his termination until he could be reinstated or, if reinstatement was not possible, until February 1999. On 29 October 1998 the complainant received a short letter from the same officer saying it was "not possible to reach a settlement that would be mutually acceptable". The complainant therefore filed his complaint impugning the Director-General's decision of 18 August 1998.

B. The complainant is challenging the termination of his fixed-term contract and UNIDO's refusal to negotiate adequate compensation. He submits that the conclusion of the Joint Appeals Board was that his post had not in effect been abolished and that the Organization's search to find him a suitable post had not been exhaustive. Since it appears from the memorandum of 18 August 1998 that the Director-General accepted the findings of the Board, he should be properly compensated for the harm done to him. Moreover, he was not informed of the true reasons for the termination of his contract.

In considering remedies open to him he says that heed should be paid to the provisions cited by the Board in its conclusions. As the complainant had served on a series of fixed-term contracts, the Board drew the attention of the Director-General to paragraph 5 of section IV of United Nations General Assembly resolution 37/126 which says that staff members on fixed-term appointments who have completed five years of continuing good service should be given every reasonable consideration for a career appointment. It also referred to UNIDO Staff Regulation 4.2 which provides that "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization".

He contends that the negotiations between him and UNIDO following the memorandum of 18 August were not carried out in good faith because the content of the discussions was in no way reflected in the offer he received on 16 October. The "negotiations" consisted of a demand that he accept "what UNIDO had unilaterally offered".

He claims the following relief:

> "1. ... to be reinstated retroactively in accordance with the recommendation of the Joint Appeals Board and be placed on Special Leave With Full Pay (SLWFP), effective from the date of the termination of [his] last contract (30 October 1996) until the date when UNIDO places [him] on an equivalent and suitable post, at headquarters or in the field as a UNIDO representative.
>
> 2. ... if ... not reinstated on a suitable post, the period on [special leave with full pay] to be from 31 October 1996 until 31 August 2000, when I would have 20 years of [pension] coverage, plus
>
>   2.1 Compensation for damages in an amount of at least US$ 75,000.
>
>   2.2 Retain all termination payments including indemnity received in October 1996.
>
> 3. During the period of [special leave with full pay] under either plea 1 or 2, UNIDO is to pay retroactively and then currently, [his] full salary (including step-in-grade increases) and other emoluments, including its contribution to [the United Nations Joint Staff Pension Fund], and the Van Breda health insurance, as well as retroactive, current and future allowances such as home leave and education grants.
>
> 4. General costs including legal fees, in an amount of US$ 10,000.
>
> 5. Correction of the reasons given for the termination of [his] contract in the letter of the Director of Personnel Services dated 20 September 1996. This correcting letter, which is to be placed in [his] official files and given to [him], should indicate that the decision to terminate [his] contract was unjustified."

He explains that in October 1997 he was assaulted and seriously injured in Guatemala. As he had no international health insurance coverage he had to meet a large proportion of the medical costs he incurred in Guatemala and subsequently in Vienna. As additional relief he asks that UNIDO be ordered "to pay the residual costs" if he is unable to obtain reimbursement through the health insurance for UNIDO staff or the Austrian social security system.

C. In its reply the Organization holds that in challenging the decision to terminate his contract the complainant shows no cause of action, inasmuch as in his letter of 18 August 1998 the Director-General accepted that compensation should be granted to him in lieu of reinstatement. It is clear from the negotiations which followed that the complainant was also prepared to accept compensation. The form the compensation was to take and the amount were the only outstanding issues.

The Organization rejects the complainant's allegation that it refused to negotiate adequate compensation: negotiations took place between 18 August and 16 October 1998. It is true that the parties had not reached a settlement when the time limit for the filing of the complaint with the Tribunal was about to expire. It had offered a settlement that was "serious, complete and equitable" and did not break off negotiations. Some of the complainant's demands could not be accommodated but that is no reason to conclude that UNIDO did not negotiate in good faith.

Under the terms of the letter of 16 October 1998 outlining UNIDO's proposed arrangement the complainant was allowed to keep all the indemnities paid upon termination. It rejects his claim to a "correcting letter", as there is no legal basis for issuing one.

As for his claim to the medical costs related to his accident in Guatemala, the Organization states that the incident happened after his separation from service and that since his request for such costs was not made in his internal appeal, it constitutes a new claim and is, therefore, irreceivable.

D. In his rejoinder the complainant emphasises that at no stage did he abandon his claim to reinstatement. Had he been retroactively reinstated he would subsequently on termination have been entitled to additional benefits provided for under UNIDO bulletins DG/B.201 and DGB(M).78.

The complainant submits that UNIDO abruptly indicated to him in its memorandum of 29 October 1998 that it would not be possible to reach "a mutually acceptable settlement" and thereafter it refused to negotiate an alternative one. He points out that by a letter of 11 December 1998 he accepted the terms of the arrangement proposed in the letter of 16 October. He then had the necessary medical examination, made further enquiries but heard no more from UNIDO.

He clarifies what he is claiming by way of medical expenses and adds that his claim was in fact submitted to the Joint Appeals Board although no comment was made on it in the Board's report.

He explains that because of his hope for reinstatement and pending negotiations, he was unable to respect the deadline of 31 December 1998 for shipping his household goods back to his home country. He sets his resultant loss at 40,000 dollars for which he claims compensation.

In additional comments to his rejoinder the complainant draws attention to a letter dated 26 May 1999 in which UNIDO informed him that examination of the settlement under discussion with him had brought to light that costs related to the United Nations Joint Staff Pension Fund would be higher than foreseen. It therefore preferred that the matter go to the Tribunal.

E. In its surrejoinder the Organization concurs that it was the new information about pension fund costs which led it to prefer a ruling by the Tribunal instead of further negotiating with the complainant, although it still dealt with his enquiries either orally or in writing.

The complainant's claim to additional benefits under the bulletins he cites is a new one. Furthermore, bulletin DG/B.201 established a programme of voluntary separation for which he did not apply, and he was no longer a staff member when bulletin DGB(M).78 entitled "UNIDO Voluntary Separation Programme" was implemented in 1998 and so could not benefit from its terms.

UNIDO rejects his claim to medical expenses as having no foundation in law. His claim to the shipment of his household goods is a new claim and as such is irreceivable.

CONSIDERATIONS

1. The complainant challenges the termination of his contract and claims reinstatement. The final decision of the Director-General, which is impugned, is dated 18 August 1998. The Director-General said that, since reinstatement was not then possible due to the lack of suitable posts,

efforts should be made to find an alternative settlement which was acceptable to both the complainant and the Organization.

2. On 16 October 1998 the Chief of the Entitlements and Social Security Section made an offer providing for:

(i) retention of indemnities and entitlements received upon termination on 30 October 1996;

(ii) a new appointment consisting of special leave without pay from 12 November 1996 to 28 February 1999 when the complainant would reach early retirement age;

(iii) payment of the complainant's and the Organization's contributions to the pension fund during the period of leave without pay;

(iv) payment of UNIDO's and the complainant's health insurance contributions for February 1999;

(v) 85,000 United States dollars compensation.

The settlement was subject to medical clearance.

3. The complainant countered that offer on 22 October 1998 by requiring reinstatement under certain conditions or otherwise:

(i) special leave with full pay from 31 October 1996 to February 1999, including allowances and other benefits, viz. pensions and health insurance contributions, home leave and education grant;

(ii) 60,000 dollars in moral damages;

(iii) 40,000 dollars for shipment of his household goods;

(iv) 5,000 dollars for legal fees;

(v) retention of the termination indemnity he had already received.

He added that a medical examination should not be a condition for a settlement.

4. The Organization wrote on 29 October 1998 to say that it was "not possible to reach a settlement that would be mutually acceptable".

5. After filing this complaint on 11 November 1998, the complainant wrote to UNIDO on 26 November to say that he was

reconsidering the offer of 16 October and requested that the compensation be increased from 85,000 to 90,000 dollars. The Organization refused the increase in a letter of 9 December 1998 and asked to be informed by 15 December 1998 if the complainant was "considering the offer ... favourably". By a letter of 11 December 1998 he said he was; furthermore, he was prepared to take the medical examination immediately. He understood, he added, that if the offer was withdrawn because the results were unfavourable he would be given an opportunity to consider an alternative offer.

6. In his rejoinder the complainant claims that he accepted UNIDO's offer by his letter of 11 December 1998. He took the medical examination on 18 and 22 December and was informed on 5 January 1999 by the Chief of the Medical Centre that the outcome was satisfactory. On 8 April 1999 he wrote complaining about not hearing from the Organization since his acceptance, on 11 December 1998, of its offer of 16 October and asked if a settlement could be effected before 20 April 1999.

7. In a letter dated 26 May 1999 UNIDO told the complainant that an examination of the settlement had revealed that costs related to the United Nations Joint Staff Pension Fund would be considerably higher than foreseen. The Organization, therefore, preferred the case to be adjudged by the Tribunal.

8. The Organization offered terms to the complainant which were countered by suggestions from him. He says he accepted the offer by his letter of 11 December 1998: the words he used were that he was "considering [it] favourably", and that is exactly what the Organization had asked him to do. He passed the medical examination and confirmed his acceptance clearly in his letter of 8 April 1999. The complainant says that on 26 May 1999 the Organization withdrew the offer.

9. In the opinion of the Tribunal, UNIDO should be held to its offer, which was not withdrawn until after it had been accepted.

10. Efforts made for the resolution of disputes are to be encouraged and the principle of good faith requires that if an offer is accepted the other party cannot then withdraw from it. The offer of 16 October 1998 should, accordingly, be implemented.

11. The complainant, however, is not entitled to his additional claims for moral damages, medical expenses, a corrective letter for his official file and the cost of shipping his household goods.

12. He is entitled to a sum for legal costs which the Tribunal fixes at 5,000 dollars.

DECISION

For the above reasons,

1. The Organization's offer of a settlement dated 16 October 1998 shall be implemented by the Organization.
2. The complainant is entitled to 5,000 United States dollars for costs.
3. All his other claims are dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Schubert** **Judgment 1925**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Atomic Energy Agency (IAEA) by Mr Thomas Oskar Schubert on 8 February 1999 and corrected on 17 March, the Agency's reply of 25 May, the complainant's rejoinder of 17 June and the IAEA's surrejoinder of 31 August 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian national born in 1961, joined the IAEA in 1984. At the material time he was employed as a video technician, grade G.7, in the Section for Equipment Development Support, Division of Technical Services, of the Department of Safeguards. As the Agency acknowledged, the complainant's work was highly appreciated by his superiors.

In March 1998 the Chief of the United Nations Security and Safety Section of the Vienna International Centre informed the Head of the IAEA's Office of Internal Audit and Evaluation Support (hereinafter the chief auditor) of allegations made by a former friend and colleague of the complainant that the latter had removed property belonging to the Agency.

An investigation was launched. On 30 March the chief auditor interrogated the complainant, who immediately admitted that he had taken, between 1993 and 1996, without permission, some items of equipment no longer needed by the Department of Safeguards. At his own invitation, his two homes were searched and he identified some of the items, which he returned the next day. During another interview on 7 April 1998, the complainant said that he had sold some items, particularly some shipping boxes, for an amount ranging between 7,000 and 10,000 Austrian schillings and that other items were in his country home. He offered to go with the investigators to identify the equipment, which he did. His wife brought some of the items back to the Agency on 9 April, as he had been admitted to the hospital with a nervous breakdown. He stayed there for about seven weeks.

By a memorandum of 15 June 1998, the chief auditor presented the findings of the investigation and asked the complainant to explain himself. The complainant confirmed the findings on 22 June. He said he had started taking equipment when he realized that the Agency stored certain goods before discarding them, even though they were still in working order. He had taken other items out of curiosity or because they were never used. On 24 June the chief auditor sent his final report to the Deputy Director General in charge of the Safeguards Department and to the Director of the Division of Personnel, in which he pointed out that both the Head of the Section and the Acting Director of the Division, to which the complainant was assigned, had indicated that the Department of Safeguards no longer needed the stolen items, but that no authorisation had been given to take them. This report was delivered to the complainant on 1 July. The next day he admitted that he had made "a big mistake", not for his personal gain but to avoid "excessive waste of items which the Agency would never use".

In consultation with the Deputy Director General in charge of the Department of Administration and the Director of the Legal Division, the Director of Personnel recommended on 3 July that the Director General summarily dismiss the complainant for serious misconduct according to Staff Rule 11.01.1(A), because there were no mitigating circumstances. By a letter of 7 July, the Director of Personnel informed him, on the

Director General's behalf, that he had been summarily dismissed without compensation. Further, an undetermined amount equal to the damages suffered by the Agency because of his actions would be deducted from the sum due to him. On 9 July the chief auditor indicated that, according to the Department of Safeguards, the items which the complainant brought back to the Agency were no longer of any value to it. As for the other items, especially those which the complainant had sold, the chief auditor estimated their value at 8,800 Austrian schillings based on the selling price quoted by the complainant.

By a letter of 16 July to the Director General the complainant appealed against the decision of dismissal. In its report sent to the Director General on 19 October, the Joint Appeals Board pointed out that the challenged decision had been "taken on the basis of a number of significant factual errors and omissions". The Board considered that there were mitigating circumstances, in particular the fact that the complainant had fully cooperated from the outset, failing which the Agency would have been incapable of supplying evidence since there was no inventory list for most of the items and that they were no longer of value to the IAEA. For this reason it advised the Director General to reduce the disciplinary sanction to a suspension without pay for a fixed period. By a letter of 11 November 1998, the impugned decision, the Director General informed the complainant that he had taken into account the Board's report, but nevertheless his decision was final.

B. In reference to the report of the Joint Appeals Board, the complainant points out that the Director of Personnel, the Deputy Director General in charge of the Department of Administration, and the Director of the Legal Division thought he had continued to commit the acts until he was "caught", whereas he had stopped two years ago. He said they believed that the removed items could have been sold at an auction, although according to the Department of Safeguards they were no longer of any value to the Agency, which would have had to pay to get rid of them. He also submits that none of the items was new, contrary to what the chief auditor's report suggested, and that his cooperation had not been deemed a mitigating circumstance, in particular because the three aforementioned persons were of the impression that the Agency already had proof against him, which was wrong. The decision of 7 July to dismiss him is therefore flawed.

The complainant contends that the mention of the Board's report in the Director General's final decision is not sufficient to cover the initial flaw because the Director General does not take it into account and does not refute its conclusions. Staff members are entitled to a reasoned explanation for administrative decisions concerning them.

The complainant seeks the quashing of the challenged decision, his reinstatement as recommended by the Joint Appeals Board, payment of moral damages and 35,000 Austrian schillings in costs.

C. In its reply the IAEA states that the complainant's actions constituted theft and demonstrate a glaring lack of integrity, which is a required standard of conduct for working in the Department of Safeguards, and that therefore it could not keep him in its employ.

The Agency argues that the Board's report was "seriously flawed with regard to the facts and conclusions reached therefrom". It denies that the initial dismissal decision was made on the basis of errors and omissions. The Director of Personnel, the Deputy Director General in charge of the Department of Administration and the Director of the Legal Division knew that the acts of which the complainant was accused had been committed between 1993 and 1996. The stolen items were still usable and of value, since he had sold some of them. The Agency points out that an outside business had estimated the value of the equipment at 69,070 Austrian schillings in 1994-1995. Lastly, it had been necessary to launch an investigation before the complainant would acknowledge the thefts and agree to return some of the items.

The Agency contends that the complainant had been fully informed about the reasons for his summary dismissal and that he had had ample opportunity to defend himself.

D. The complainant, in his rejoinder, points out that the recommendation for dismissal of 3 July 1998 indicated that his actions "extended over five years" which proves that the authors of the recommendation wrongfully believed that he had not stopped until the investigation began. He argues that without his cooperation the Agency would not have been able to identify the items he had removed because there were no records of them. He adds that the Director General had not indicated that he had rejected the recommendation of the Joint Appeals Board on the grounds that its report was flawed. The grounds of the challenged decision were shaky and that affected his ability to defend himself. Furthermore, there is no evidence to suggest that the report was flawed. He considers it serious that the Director General can, without explanation, reject a unanimous, well-documented recommendation of such an appeals body, especially since he did not benefit from a disciplinary procedure before the Joint Disciplinary Board, a point which the Joint Appeals Board raised in its report.

E. In its surrejoinder the IAEA points out that the Director General is free to endorse or reject the Joint Appeals Board's recommendations. The complainant's cooperation during the investigation was indeed taken into account, but his actions were sufficient to warrant his dismissal, of which he was clearly informed.

CONSIDERATIONS

1. The complainant, a former staff member of the International Atomic Energy Agency (IAEA), challenges a decision by which the Director General rejected the recommendations of the Joint Appeals Board and confirmed an earlier decision to dismiss him summarily for serious misconduct.

2. On the complainant's own admission, he removed from the Agency various items of equipment without authorisation. Those items had outlived their usefulness for the Agency but were still usable, and after taking them, the complainant either gave them away or sold them.

3. The Joint Appeals Board recommended that the decision to dismiss summarily the complainant be replaced by a less serious sanction, and expressed the view that the decision had been "taken on the basis of a number of significant factual errors and omissions". These were identified by the Board as follows:

(a) although the complainant had been removing Agency equipment over a three-year period (1993-1996), he had stopped doing so two years before he was investigated and "caught";

(b) although the complainant had used, given away or sold the stolen items of equipment, the Board preferred the view that they were of no value to the Agency and were in fact "junk";

(c) none of the items taken was new or any longer of use to the Agency;

(d) the complainant had cooperated fully with the investigation into the thefts.

4. While the complainant recognises that the Director General was in no way bound to follow the recommendation of the Board, he says he was obliged at least to consider it and alleges that he failed to do so. He also alleges that the Director General failed to give proper reasons for the decision to summarily dismiss him.

5. Neither of these allegations resists examination. It is clear from a reading of the Director General's final decision that he had carefully read and considered the Board's recommendation and had decided to reject it. He was certainly entitled to treat the so-called "factual errors" and "omissions" identified by the Board as being of little significance. There is no doubt that the equipment taken had ceased to be useful to the Agency but the Board's finding that it was "junk" is simply incompatible with the complainant's admission that he had sold some of the items. As for the assertions that the complainant had ceased his depredations by the time he was caught and had cooperated with the investigation, their weight as mitigating factors ~~was~~ for the Director General alone to appreciate. The Tribunal sees no reason in the circumstances to interfere in the exercise of that discretion.

6. There can be no doubt that theft by an official of an international organisation of goods belonging to that organisation constitutes serious misconduct which may warrant summary dismissal. As the Tribunal said in Judgment 1828 (*in re* Kalla):

> "Even though the amount at stake was not large, an intent to defraud the Organization is a most serious offence. The Organization may expect the highest

> standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing her for the misconduct she had committed."

7. Finally, it is simply untrue to assert, as the complainant does, that the Agency did not explain its reasons for his summary dismissal. It is sufficient to read the letter of the Director General rejecting the recommendation of the Joint Appeals Board and confirming the complainant's summary dismissal to see that there is no substance in his allegation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* De Riemaeker (No. 5)** **Judgment 1926**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mrs Irène Eugénia Luppens, née De Riemaeker, against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 20 February 1999 and corrected on 24 March, Eurocontrol's reply of 9 July 1999 and the complainant's waiver of her right to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some of the material facts are set out in Judgments 1595 of 30 January 1997 and 1771 of 9 July 1998 on the complainant's third and fourth complaints.

Following Judgment 1595, setting aside the appointment of Mr Rutherford as head of the Translation and Interpretation Division, competition HQ-94-LA/080 was resumed and declared unsuccessful. Mr Rutherford was appointed acting head. A new notice of competition for the same post, with the code HQ-97-LA/031, which the Staff Committee did not endorse, was published on 28 November 1997. The requirement contained in the first notice of competition and which had not been met by Mr Rutherford was no longer present and emphasis was placed on requirements relating to the organisation and management of the service.

The complainant and Mr Rutherford were the only two candidates. The members of the selection board met on 22 January 1998, but the representative of the Staff Committee refused to sign the record of proceedings. The Staff Committee appointed another representative and a new meeting was held on 28 January. Only Mr Rutherford was named on the short list of candidates and he was subsequently promoted to grade LA3. In a letter of 17 February, the acting Director of Human Resources informed the complainant of the rejection of her candidacy on the grounds that her "management skills" were not adequate.

On 20 May 1998, the complainant appealed to the Director General against the decision of 17 February. The Joint Committee for Disputes recommended the dismissal of the internal complaint in an opinion dated 15 October. By a letter of 17 November 1998, which is the impugned decision, the Director General dismissed the complaint.

B. The complainant submits that the publication of the notice of competition HQ-97-LA/031 was flawed because the Staff Committee refused to endorse it and the selection of Mr Rutherford had "long been envisaged". She contends that a staff representative on the Joint Committee for Disputes was both judge and party, being a member of the legal service which had defended the Agency in the context of her previous complaints.

The complainant welcomes the fact that the Agency decided not to convene a promotion board after the selection board, which she says is in conformity with the procedure laid down in the Staff Regulations governing officials of the Eurocontrol Agency; but she deplores the Organisation's inconstancy and its arbitrary application of the Staff Regulations.

She argues that the very imprecise reasons given for the decision to reject her candidacy are designed to prevent any control of its lawfulness by the Tribunal. She notes that the first selection board, basing its opinion on a much more precise and demanding notice of competition, recognised her capacity to discharge the functions of the post put up for competition, that her evaluation reports for the period during which she was acting head of the Translation and Interpretation Division were excellent and that there had been no fundamental change in the structure and functions of the Division between the two competition procedures.

She contends that the misuse of authority, which she already denounced in her previous submissions, is demonstrated by the facts taken as a whole rather than in isolation and confirmed by the "new fact" of the second appointment of Mr Rutherford.

The complainant requests the Tribunal "to order the joinder of the submissions filed in the two previous cases"; order the production of the documents cited in the rejoinder in the case which led to Judgment 1595; hold hearings; set aside the impugned decision and the challenged appointment; and grant her costs.

C. In its reply the Agency asks the Tribunal to rule on the receivability of the complainant's claims which, it says, differ from those set out in her internal complaint.

On the merits, it submits that the practice of transmitting notices of competition to the Staff Committee was for the purpose of informing the staff representatives and giving them an opportunity to make comments; a refusal to endorse a notice or negative comments on it would not prevent its publication. It adds that the staff member of the legal service expresses a personal opinion when representing the staff on the Committee and, if the case is subsequently brought before the Tribunal, the party to the case is the Agency and not that individual staff member.

The Agency adds that an ad hoc promotion board did indeed meet on 3 February 1998 and recommended the promotion of Mr Rutherford to grade LA3. The Agency contends that the first notice of competition "was in fact badly drawn up as regards the future needs of the Organisation" and that it subsequently "emerged" that managerial skills were essential for the post. It points out that the Tribunal held in Judgment 1771 that the complainant could be rejected by the second selection board, even though her evaluation reports recognised her capacities for the organisation and management of a service.

In its view, the complainant has not proved the existence of misuse of authority and the facts cited have already been submitted for review by the Tribunal.

The Agency requests that the complainant be ordered to bear all the costs.

CONSIDERATIONS

1. The material facts are partly set out in Judgments 1595 and 1771 delivered by the Tribunal on 30 January 1997 and 9 July 1998, respectively.

It may be recalled that competition procedure HQ-94-LA/080, opened in 1994 for the appointment of the head of the Translation and Interpretation Division of Eurocontrol, was declared unsuccessful after all the events related in the above judgments. On 28 November 1997, the Agency published a new notice of competition, HQ-97-LA/031, which differed from the notice of the 1994 competition in that, under the qualifications required from the future head of the Division, emphasis was placed on the capacity to organise and manage the Division.

The procedure decided on for the competition was that envisaged in Article 30 of the Staff Regulations, limiting applicants to the staff of the Agency and of national administrations.

The members of the selection board met on 22 January 1998. However, one of them, who had been appointed by the Staff Committee, refused to sign the record of proceedings, thereby making it necessary for the board to meet once again on 28 January 1998 with another member appointed by the Committee.

Only one candidate, Mr Rutherford, was selected for the short list. The ad hoc promotion board recommended his promotion to grade LA3. The Director General followed this recommendation and appointed Mr Rutherford head of the Translation and Interpretation Division.

2. The complainant, who had been informed on 17 February 1998 that she had not been considered suitable to be appointed to the post of head of the Division, filed an internal complaint.

The Director General followed the recommendation of the Joint Committee for Disputes and rejected the internal complaint on 17 November 1998. It is this decision which is being impugned.

The complainant requests the Tribunal to:

- order the joinder of the submissions filed in the previous two cases;
- order the production by the Agency of all the documents mentioned, "particularly in the rejoinder in the case which led to Judgment 1595";
- order hearings;
- set aside the dismissal, dated 17 November 1998, of the internal complaint filed on 20 May 1998 and quash the new appointment of Mr Rutherford confirming him in his position as head of the Translation and Interpretation Division; and
- order the Agency to pay costs.

3. The complainant has four pleas: firstly, the publication of the notice of competition without the prior endorsement of the Staff Committee; secondly, the arbitrary application of the Staff Regulations; thirdly, a flaw in the reasoning for the rejection of her candidacy; and, finally, misuse of authority.

Publication of the notice of competition without the prior endorsement of the Staff Committee

4. The Agency is taken to task for publishing the notice of competition without the prior endorsement of the Staff Committee. In the complainant's view, this constitutes a distortion of constant practice.

The complainant contends that notices of competition have always been submitted to the Staff Committee for its opinion and that the absence of the prior endorsement by the Committee resulted in the non-publication of the notice, or its modification.

In the present case, when the Staff Committee refused to endorse the draft notice of competition, the complainant says that the Administration should have modified the text of the notice, as custom required. Instead, it preferred to go ahead and publish the notice in its initial form.

The Tribunal finds that, although it is not contested that the Agency's practice was to transmit notices of competition to the Staff Committee before their publication, both parties admit that the official endorsement of the Staff Committee was not a prerequisite for publication. The only obligation arising out of the practice invoked by the complainant consisted of submitting notices of competition to the Staff Committee for its endorsement or comments. A refusal by the Staff Committee, as in the present case, to issue an opinion cannot therefore impede or taint the competition procedure, as indicated by the Joint Committee for Disputes.

5. The fact that the Joint Committee, which deemed the complainant's internal complaint to have no basis in law, has amongst its members a staff representative assigned to the legal service of the Agency who sometimes participates in drawing up its submissions to the Tribunal, cannot be held at this stage of the proceedings as being evidence in support of the complainant's case, since she did not raise any objections to the composition of the Joint Committee at the appropriate time.

Moreover, when sitting on the Committee, the staff representative issues a personal opinion. It is the Agency which is the party before the Tribunal and the submissions drawn up by the staff member reflect Eurocontrol's position.

The ad hoc promotion board

6. The complainant argues that the Agency applied the Staff Regulations in an arbitrary manner since, after it successfully defended before the Tribunal the "division" of the recruitment procedure into two parts (selection board followed by a promotion board), it did not respect this practice in the present case.

This plea is mistaken. As affirmed by the Agency, without being contradicted by the complainant, who waived her right to submit a rejoinder, an ad hoc promotion board did indeed meet on 3 February 1998 to examine the possible promotion of Mr Rutherford. The board's recommendation was posted for information.

Flaws in the reasons given for rejecting the complainant's candidacy

7. The complainant contends that the reasons given for the rejection of her candidacy are flawed. She says that the acting Director of Human Resources confines himself, in his letter of 17 February 1998, to explaining the rejection of her candidacy in these terms: "it was considered that the qualifications, and particularly the managerial skills, required for this post were not fulfilled to the desired level by your candidacy". The complainant says that such wording, by its very imprecision, is intended to prevent any review by a judicial authority and that its admission as sufficient reasoning would create an area of non-law in international organisations.

She argues that the first selection board, whose opinion was based on a notice of competition which was much more demanding and precise than the second with regard to the qualifications required by the head of the Division, had recognised her capacity to discharge the corresponding functions. She adds that Mr Rutherford's inability to meet the requirements set out in the first notice of competition had been recognised by the Tribunal.

Finally, she refers to her last evaluation report, dated 20 June 1996, covering a period that included the time she was acting head of the Division, to underscore her capacity to discharge the post covered by notice of competition HQ-97-LA/031.

In its reply the Agency indicates that, after competition HQ-94-LA/080 had been declared unsuccessful, an internal study was carried out of the support services and, taking into account the developments known to the Agency, it had emerged that managerial skills had become essential to direct the Translation and Interpretation Division. A new notice of competition, which differed substantially from the previous notice in the criteria required, was therefore published on 28 November 1997.

The Tribunal ruled that this procedure was valid in Judgment 1771, in which it found that "if a post is vacant and one competition to fill it has failed, the organisation may of course hold another and in doing so change the requirements in the notice of vacancy".

In view of this precedent, the new notice of competition was therefore justified in setting out criteria requiring a high level of competence and proven organisational and managerial skills.

Based on the above, the Tribunal finds that the Agency committed no error in its reasoning when it rejected the complainant's candidacy on the grounds that "following the examination of [her] qualifications and professional experience by the selection board, it was deemed that the qualifications, and particularly the managerial skills, required for the post were not fulfilled to the desired level by [her] candidacy".

Moreover, as noted by the Agency, the recognition of qualities in the complainant by an evaluation report is not binding on the selection board, which has to take into account a series of factors and assess them in accordance with the conditions set out in the notice of competition.

Misuse of authority

8. The complainant contends that, in her various submissions in the previous cases, and particularly in her rejoinder of 16 February 1998 in the case which led to Judgment 1771, she has expounded the reasons which, taken together rather than in isolation, can only demonstrate the existence of abuse of authority in favour of Mr Rutherford's candidacy.

She says that more recent events bear out her arguments. She emphasises that the second appointment of Mr Rutherford is the new fact which undermines the pleas used by the Agency with a view to hiding the truth. She adds that, in its surrejoinder of 27 April 1998 in the previous case, the Agency even concealed from the Tribunal the appointment of Mr Rutherford as head of the Translation and Interpretation Division, when in fact this appointment had been announced two months previously in a public notice dated 20 February 1998, although she herself had not been informed.

She adds that the confirmation of Mr Rutherford's appointment in February 1998 has to be seen in the light of a very important fact which she had already reported in her complaint of 22 May 1995. In that complaint, she indicated that a staff member of the Agency had reported as early as October 1993 that pressure had been exerted for Mr Rutherford to become head of the Division. More precisely, the competent Director is alleged to have stated to Mr M., reviser in the Translation and Interpretation Division, that Mr Rutherford would be the next head of the Division. This testimony would explain in particular why the appearance of the first notice of competition had been delayed to allow Mr Rutherford to acquire sufficient seniority in his grade to be able to apply and why, what is more, when the above notice was not entirely to his satisfaction, he did not hesitate to criticise it. She says that he was given full satisfaction five years after the above testimony.

The Tribunal observes that the plea of misuse of authority has already been made in the case which led to Judgment 1771. The facts cited in the present complaint as proof of misuse of authority, with the exception of those qualified as new by the complainant, were examined by the Tribunal in Judgment 1771 under 6, to which it explicitly refers and where it gave the reasons for which it found that this plea, supported in the present case by the same arguments, could not stand.

9. With regard to the new facts, the Tribunal holds that the absence of a reference to the new appointment of Mr Rutherford in the Agency's last submission in the context of the case which led to Judgment 1771,

which the complainant interprets as a deliberate intention to conceal the appointment from the Tribunal, as well as the supposed link between the appointment and the information that the competent Director is alleged to have conveyed to Mr M., in confidence, concerning the successor to the head of the Translation and Interpretation Division, do not constitute proof of misuse of authority in the present case.

The Agency was not under the obligation to mention the appointment of Mr Rutherford in the context of a case which was confined to the execution of Judgment 1595. And the information intimated to Mr M., even if proved, could not taint the appointment of Mr Rutherford, which is the outcome of a process that the Tribunal found to be lawful in Judgment 1771, in which it held that "there is no reason to suppose that [the Director General] wanted to appoint someone unqualified or depart from due process".

The person appointed meets the requirements set out in the notice of competition and, as indicated above, the competition procedure was not tainted by any flaw.

10. The complaint must therefore fail and it is not necessary to order hearings or any other investigation. Nor is it necessary to rule on the defendant's plea of irreceivability.

11. The counter-claim to an award of costs against the complainant must also fail.

DECISION

For the above reasons,

The complaint and Eurocontrol's counter-claim are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

O

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Kohli (No. 2)**

Judgment 1927

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Amrik Singh Kohli against the World Health Organization (WHO) on 8 February 1999 and corrected on 7 April, the WHO's reply of 2 July, the complainant's rejoinder of 28 July and the Organization's surrejoinder of 6 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Pakistan who was born in 1938, entered the service of the WHO's Regional Office for South-East Asia (SEARO) in September 1962. He retired in July 1998. At the time of the material facts, he was administrative assistant at grade ND.X with responsibility, among other matters, for handling issues related to the duty-free importation, registration formalities and the export of private motor vehicles for WHO personnel.

In October 1997 a staff member who was to be reassigned to Africa asked the complainant to obtain the necessary authorisations for the sale of his vehicle. In mid-November the presumed purchaser of the vehicle withdrew from the transaction. She stated that she had taken this decision following a telephone conversation with the complainant. In a letter of 25 November 1997 the Regional Personnel Officer asked the complainant to provide him with explanations concerning his involvement in the sale of the vehicle. He also informed him that an investigation had been initiated into the manner in which he had handled the matter. Pending the outcome of the investigation, he was suspended from certain duties. These consisted of the duties relating to the sale and registration of motor vehicles for staff, the importation or exportation of personal effects belonging to staff and the purchase of duty-free products for staff.

By a letter of 3 December the complainant provided his explanations to the Regional Personnel Officer, refuted the allegations made against him and asked him to kindly withdraw his letter of 25 November.

On 17 December 1997 he appealed to the regional Board of Appeal. He once again sought the withdrawal of the letter of 25 November, as well as his reinstatement in all his duties and compensation for moral damages. On the same day, the Regional Personnel Officer replied to the complainant's letter of 3 December 1997. He informed the complainant that the investigation had not turned up any new information and that he was absolved and restored to all his duties.

The regional Board of Appeal issued its report on 27 February 1998 and recommended the dismissal of the appeal on grounds of irreceivability, since the complainant had not challenged a final decision. In a letter of 9 March 1998, the Regional Director informed the complainant that he had accepted this recommendation. He assumed that as the complainant had been absolved he had obtained satisfaction, but told him that he was nevertheless withdrawing the letter of 25 November 1997.

In April 1998 the complainant appealed to the headquarters Board of Appeal, maintaining only his claim to moral damages. The Board reported on 7 October 1998. It too was of the opinion that his initial appeal to the regional Board was irreceivable. It found that in suspending the complainant from some of his duties the Administration had acted within the scope of the Staff Rules and Regulations and concluded that there was no justification for a payment of compensation to the complainant. By a letter of 11 November 1998, which is the impugned decision, the Director-General confirmed those reasons to the complainant and rejected his appeal.

B. On the receivability, the complainant argues that the decision of 25 November 1997 was "final" within the meaning of Staff Rule 1230.8.1 inasmuch as it had been taken by a "duly authorized official" and had been notified to him in writing. Furthermore, his request for the withdrawal of that decision made in his letter of 3 December 1997 did not negate his right to challenge it in his internal appeal.

On the merits, the complainant says that there was a breach of the Staff Rules, since there is no provision authorising a partial suspension of duties. By taking a decision to divest the complainant of most of his duties, the Regional Personnel Officer showed bias. He also damaged the complainant's reputation and wounded his dignity.

He adds that the testimony of the presumed purchaser was worthless and that he always discharged his responsibilities for the sale and purchase of vehicles to the satisfaction of the staff.

The complainant requests the Tribunal to grant him 200,000 United States dollars as compensation for moral injury and 2,500 dollars in costs.

C. In its reply the WHO refers to the findings of the two Boards of Appeal in support of its contention that the complaint is irreceivable. It explains that the complainant did not wait three months before appealing to the regional Board of Appeal, as required by Staff Rule 1230.8.2. Furthermore, the decision to suspend him from some of his duties was not final, since it consisted of an interim decision pending the outcome of the investigation. Finally, by absolving the complainant and reinstating him in all his duties, and then withdrawing the letter of 25 November 1997 from his file, the Administration gave him complete satisfaction. The complaint therefore shows no cause for action.

On the basis of Judgment 447 (*in re* Quiñones) under 11, the WHO explains in subsidiary argument that "where the impugned decision is not unlawful ... compensation [for moral prejudice] is due only in exceptional circumstances, viz. where the wrong is especially grave". In the present case, the decision to remove the complainant from certain of his duties as an interim measure was indeed lawful since it was in line with Staff Rule 1120 on "suspension pending investigation". Moreover, the complainant has provided no evidence of the injury which he claims to have suffered. Indeed, by only suspending him from the duties directly implicated, the WHO respected his dignity. The conditions for granting compensation for moral injury have not therefore been met.

For the purposes of the investigation, it was essential to seek the testimony of the prospective purchaser. As the investigation was inconclusive and the complainant's career record in the Organization was good, it was decided to give him the benefit of the doubt.

D. In his rejoinder the complainant adds that prolonging the investigation beyond 25 November 1997 constituted abuse of authority.

The private dealings between the seller and the purchaser did not concern him. He says that he was treated as a "scapegoat" even though he had at no stage interfered in the sale of the vehicle in question.

E. In its surrejoinder the Organization maintains its arguments. It indicates that the continuation of the investigation after 25 November was essential to due process and observance of the rules.

CONSIDERATIONS

1. The complainant was a staff member in the General Services category of the WHO's Regional Office for South-East Asia (SEARO) for over thirty-five years. He retired on 31 July 1998. In 1997 he was employed as administrative assistant in charge of the Central Services Unit where, among other duties, he had to handle all issues concerning private motor vehicles of staff members including matters related to duty-free importation, registration formalities, and the exportation of cars.

Following an incident concerning the sale of a vehicle belonging to a member of the staff who, as a result of the alleged intervention of the complainant, was not able to sell his vehicle to the presumed purchaser, the WHO's Regional Office decided to initiate an investigation. By a letter of 25 November 1997, the complainant was requested to provide a written explanation of the incident before 5 December 1997 and he was informed that, pending the finalisation of the investigation, he was removed from all his duties which related to the sale and registration of motor vehicles for staff and the importation or exportation of their personal effects, as well as the purchase of duty-free products.

2. On 3 December 1997 the complainant sent a letter containing explanations and justifications to the Regional Personnel Officer, requesting him to withdraw the letter of 25 November, failing which he would initiate appeal procedures. On 17 December 1997 he was informed in reply that following the investigation, which had been closed, there appeared to be outstanding contradictions between his statements and those of the prospective purchaser of the vehicle and that, in view of the impossibility of clarifying the matter further, he was absolved and reinstated in all his duties. On the same day, the complainant had lodged an appeal with the regional Board of Appeal seeking the withdrawal of the decision of 25 November 1997 and a payment of compensation for moral injury. However, his appeal was found to be premature and therefore irreceivable both by the regional Board and the Regional Director. The complainant then appealed to the headquarters Board of Appeal, which confirmed the recommendation of the regional Board and recommended that the Director-General reject his appeal. In a decision of 11 November 1998, the Director-General accepted this recommendation, while referring to the Board's comments which emphasised that the complainant had been absolved, that he had suffered no injury, that the allegations were such that an investigation had been justified and that there was no justification for an award of moral damages.

3. The complainant filed a complaint with the Tribunal impugning the decision of 11 November 1998, received by him on 20 November. In his complaint he claims compensation from the WHO for the injury suffered by him as a result of the serious faults committed by the Organization and the harm done to his reputation.

4. In reply to the complaint, the WHO has three pleas of irreceivability. In the first place, it says that the complainant's appeal to the regional Board was premature because he should have waited three months after receiving the decision of 25 November 1997 before taking action. It adds that the decision to remove him from his duties was an interim measure and could not be considered "final" within the meaning of Staff Rule 1230.8.1. Finally, it contends that the complainant should be regarded as having obtained satisfaction in view of his restoration to all his rights as of 17 December 1997. These pleas are not convincing.

5. In practice, while suspension is indeed an essentially interim measure which maintains the rights of the staff member concerned, as the Tribunal recalled in Judgment 353 (*in re* Bastani), it is nevertheless a decision which causes injury to the person concerned. While it is also true that the complainant should in principle have waited three months before appealing against the suspension, in the circumstances of the present case that time period is of no relevance as the decision the complainant appealed against had been revoked. Finally, while the complaint may seem to show no cause of action, since the decision to suspend him has been revoked, the measure did have material - although not financial - and particularly moral consequences during the period for which it was in effect. Certain of the complainant's duties were withdrawn, although he continued to receive full pay. In these conditions, the complaint does still show cause for action: see, in this respect, Judgment 1680 (*in re* Byng-Clarke and others), delivered on 29 January 1998.

6. The evidence shows that, as noted by the headquarters Board of Appeal, an investigation was justified in view of the allegations made against the complainant. The suspension of the complainant, which was in any case limited in scope, was not by its nature a sanction, but was justified by the needs of the investigation. The Organization would have been legally justified in suspending the complainant from all his functions, but it preferred to confine the suspension to certain of his duties, which demonstrates that it did not intend the measure to have any disciplinary effect. Moreover, the measure decided upon on 25 November was revoked on 17 December 1997 after a rapid and discreet investigation and, as noted

above, the complainant continued to receive full pay. There is no evidence that the decision to suspend him had its origins in personal animosity or was based on unfounded or unlawful reasons.

7. There are grounds for doubting the receivability of his claim that the Organization should be ordered to compensate the complainant for the moral injury which he says he suffered since, as emphasised by the WHO, no final decision was taken within the meaning of Staff Rule 1230.8.1. Without ruling on the receivability of the above claim, the Tribunal dismisses it on the merits. The decision to suspend the complainant was lawful and the evidence shows no fault which can be attributed to the Organization in this delicate matter, in which it was necessary to ascertain the truth, while protecting the dignity and reputation of the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Merciai**

Judgment 1928

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Annalisa Merciai against the World Health Organization (WHO) on 21 September 1998 and corrected on 9 November 1998, the WHO's reply of 10 February 1999, the complainant's rejoinder of 19 April and the Organization's surrejoinder of 15 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, of Italian nationality and born in 1961, entered the service of the WHO on 16 March 1991 as a technical officer at grade P.4 in the Human Resources and Fellowships Unit in the Regional Office for Africa in Brazzaville, in the Congo. She was responsible for the fellowships programme. Her initial appointment was for two years and it was twice extended for the same period.

Her supervision of the fellowships programme ended in August 1995. Following a discussion with the complainant the Director of Administration and Finance wrote to her on 21 August 1995 confirming that her post was one of those which would be abolished at the end of the year and that she could choose between separation by mutual agreement under Staff Rule 1015 or the application of the reduction-in-force procedure under Rule 1050. The acting personnel officer at the Regional Office told her in a memorandum which she received on 26 October 1995 that her post was to be abolished on 31 March 1996 and that, as no opportunity for reassignment had materialised, she would be separated by mutual agreement with an enhanced indemnity but "without prejudice to [her] rights for a Reduction-in-Force procedure". In a reply of 21 November 1995 she said that she had decided against separation by mutual agreement and asked to be considered for reassignment worldwide under the reduction-in-force procedure. The Reduction-in-Force Committee studied her case and, being unable to offer her a post in her occupational group, allowed her to compete for a post in other groups.

On 15 March 1996 the Director of the Division of Personnel informed the complainant about a P.3 post which was vacant in Kigali, Rwanda. She did not apply for it at that time. On 29 April the Director wrote to her again to let her know that, after examining her case the Committee had not found her to be "better suited for retention than other candidates with whom she was compared". He gave her three months' notice that her appointment would end on 31 July 1996.

In a memorandum of 28 May 1996 she said she would agree to take six months' leave without pay to allow the Organization time to reassign her and it was granted to her from 1 August in lieu of separation under Staff Rule 655.1. On 12 August she expressed interest in the P.3 post in Kigali. She was told on 2 October that her reassignment to that post had been approved by the Regional Director, and she took up that appointment on 12 November.

In two memoranda to the complainant dated 19 July and15 November, which she received after her arrival in Rwanda, the Regional Director criticised her performance in her previous post. He pursued the matter in a further memorandum of 2 December. On 31 December 1996 she indicated that she would not seek the renewal of her contract when it expired on 31 March 1997. The Regional Director asked her to reconsider that decision in his memorandum of 27 January 1997. On 1 March 1997 he offered her a P.2 post in the Regional Office on the understanding that she would keep her current grade of P.3. She nonetheless left the employ of the Organization on 31 March 1997.

The complainant had meanwhile, in June 1996, appealed to the regional Board of Appeal against the decision to abolish her former post and to terminate her appointment. In its report of 14 March 1997 the Board recommended (1) reintegration on a suitable post and (2) the removal of memoranda dated 15 November and 2 December 1996 from her personal files. The Regional Director accepted those recommendations, but informed her that the first one had already been implemented. She then appealed to the headquarters Board of Appeal and while, in its report of 14 April 1998, it expressed the opinion that the reduction-in-force procedure had been correctly carried out, it concluded that the failure to provide suitable reassignment for the complainant and the decision to end her employment were tainted with prejudice. It reported that she "had not been treated in the same way as other staff members in the same situation" and recommended allowing the complainant to choose between reinstatement on a post "truly commensurate" with her experience, or compensation. In a letter of 12 June 1998, which the complainant impugns, the Director-General informed her that he did not accept that recommendation.

B. The complainant has five pleas. The first is that the decision to abolish her post and separate her from the Organization stemmed from the "personal prejudice, ill will, and malice" of the Regional Director towards her. Her responsibility for the fellowships programme came to an abrupt halt on 1 August 1995 and she was never again given duties with the same level of responsibility. There was further ill will on the part of the Administration in that it refused to provide her with the performance appraisal due in March 1996 despite her requests. She also protests that she was sent to one of the most "demanding and dangerous duty stations".

Secondly, there were irregularities in the reduction-in-force procedure. It was not carried out objectively or fairly and the WHO failed to make her a reasonable offer of reassignment as required by Rule 1050.2.5. It did not immediately notify her of her rights and obligations as required by Manual paragraph II.9.280 or give her the reasons why she was not selected for a post. At the Reduction-in-Force

Committee meeting of 28 August 1995 it was proposed that the complainant could be considered for four vacant posts in the Regional Office for Africa, one being in the Fellowships Unit. However, having been swayed by representatives of the Administration, the Committee rejected the suggestion.

Thirdly, she argues that she should have been allowed "personal input" in the reduction-in-force procedure.

Fourthly, she claims that her post was not abolished as it was "reconstituted" at grade P.5.

Lastly, she submits that three memoranda of 19 July, 15 November and 2 December 1996, which questioned for the first time her performance in the Fellowships Unit, were at odds with her satisfactory appraisal reports. They formed part of a campaign to discredit her in the wake of her internal appeal, constituted defamation of character and, since they were put in her personal files, caused her moral injury. At the Administration's instigation four WHO country representatives unjustly criticised in writing her performance as supervisor of the Fellowships Unit sixteen months after the duties of that post had been taken away from her.

She claims the following relief: (1) the quashing of the impugned decision of 12 June 1998; (2) the setting aside of the notice of termination dated 29 April 1996 by which her appointment was to end at 31 July 1996, with reinstatement on a P.4 post commensurate with her experience and payment of salary and benefits at that grade from 31 July 1997, less any sums paid to her after July 1996; (3) the quashing of all the decisions taken by the WHO during April 1996 as a result of the reduction-in-force procedure, including those terminating her appointment and placing her on special leave without pay; (4) removal from her personal files of the offending memoranda of 19 July, 15 November and 2 December 1996 and proof of such action; (5) an apology in writing from the Regional Director for the "wrongful treatment" from May 1995 onwards to be "published throughout the entire WHO organisation"; (6) an award of 100,000 Swiss francs in moral injury; (7) interest at 10 per cent per annum from 31 July 1996 on all sums awarded to her to "the date of complete satisfaction of any judgment hereunder"; (8) the sum of 15,000 francs in costs; and (9) such other relief as the Tribunal sees fit.

If reinstatement is not possible, she claims additional damages equal to five years of her final salary and allowances at P.4 level. She also asks the WHO to produce copies for the Tribunal, and for her, of numerous documents, mainly relating to the reduction-in-force procedure.

C. In its reply the Organization contends that the complainant's claims are without merit. The Regional Director's concerns about certain aspects of her performance played no part in the decision to abolish her post, and the complainant's allegations that he was prejudiced towards her are "speculative".The decision to abolish the complainant's post was taken for objective reasons resulting from budgetary constraints in 1995 and 1996 and programme priorities at the Regional Office. The WHO rejects the complainant's suggestion that there were irregularities during the procedure that led to the abolition of her post: it explains that on 13 October 1995 the Reduction-in-Force Committee recommended the abolition of 20 professional posts, including the complainant's whose duties in the fellowships programme had already been redistributed in August 1995. The minutes of the Regional Office's Reduction-in-Force Committee meeting of 28 August 1995 do not corroborate the complainant's view that there was any interference by "the Administration" to prevent her from being considered for vacant posts in the region.

Moreover, she was fully informed of her rights in the reduction-in-force procedure. Initially an administrative instruction dated 10 August 1995 relating to measures involved in the reduction procedure was sent to all staff in the region and she was kept informed about the procedure by the Division of Personnel on several occasions in 1996. As regards her desire to state her case to the Reduction-in-Force Committee, no candidates for retention were heard in person and appearing before the Committee is not prescribed in the rules.

Her former post was abolished for financial reasons and was not "reconstituted": her previous duties were redistributed to other staff. The Organization lists details of attempts made to reassign the complainant in other Regional Offices and at WHO headquarters before, during and after the reduction-in-force procedure. Contrary to what the headquarters Board of Appeal had indicated, she could not have been offered the Kigali post in 1995: it was a new post, scheduled to be established in February 1996. It was a grade lower than her previous one, which is permitted under Rule 570.1.3; however, she benefited from an increased salary through being placed on the highest step in her new grade. It should not be overlooked that the complainant was offered and accepted reassignment and the termination of her appointment was never put into effect. The complainant resigned even when offered an assignment back in the Regional Office. She is in effect asking the Tribunal to 'undo' her own decision.

The deliberations of the Reduction-in-Force Committee are confidential, but at the request of the Tribunal the Organization would make available to it copies of information on posts for which the complainant was considered and which it released to the headquarters Board. It declines to make them, or the numerous other documents she has asked for, available to the complainant.

It points out that it has removed the copies of the offending memoranda from her personal files. The Regional Director did ask WHO representatives in 1996 to formulate in writing views they had expressed at an earlier stage about the running of the fellowships programme, but they were not fabricated views and were not part of a "smear campaign" against her. The complainant knew of the concerns in question and in any event they have no bearing on the present complaint relating to the decision to abolish the complainant's post under the reduction-in-force procedure, a decision which was taken before those memoranda were sent.

The headquarters Board erred in thinking that the complainant's post had been singled out for "immediate termination" and therefore that the complainant "had not been treated in the same way as other staff members". Her post was scheduled to end on 31 March 1996 and she had been allowed more than five months' notice.

D. In her rejoinder the complainant presses her claims and enlarges on her pleas. She regrets the Organization's refusal to allow her access to the documents she asked to see. In so doing it has limited her ability to adequately preserve her rights as an international civil servant.

She observes that she is not challenging the need for a reduction-in-force procedure in 1996, she is affirming that the decision to abolish her post was tainted with malice, an allegation not rebutted by the Organization in its reply. There was interference by the Administration in the Reduction-in-Force Committee proceedings. Evidence to that effect was provided by members of the Committee when called upon to testify before the regional Board of Appeal. It was the prejudiced attitude of the Organization towards her which prevented her reassignment to Kigali from taking place in March 1996. It did not make "diligent" efforts to reassign her, causing her the loss of some three-and-a-half months' pay.

She submits that she did not resign, but rather allowed her contract to expire without seeking its renewal.

E. In its surrejoinder the WHO insists that the decision to abolish her post was taken by an independent Reduction-in-Force Committee which included staff representatives. According to the relevant minutes neither the member mentioned by the complainant, nor anybody else on the Committee dissented. There was no mention therein of blocked efforts to reassign the complainant.

CONSIDERATIONS

1. A decision was taken by the WHO in June 1995 to implement an Organization-wide reduction-in-force exercise. The staff members whose posts were abolished were given the choice of a mutually agreed separation or participation in a reduction-in-force exercise. The complainant chose the latter.

2. On 29 April 1996, the Director of the Division of Personnel told the complainant that she had been unsuccessful in the reduction-in-force exercise and that her appointment would, therefore, be terminated on 31 July 1996.

3. The complainant was, however, reassigned to a P.3 post in Kigali. In a letter dated 31 December 1996 she said she did not wish her

contract to be renewed beyond 31 March 1997 when it was due to expire unless she was reinstated by the Tribunal. She complained about two memoranda dated 19 July and 15 November 1996 raising "unacceptable allegations about [her] performance, work relationship and temper". Those allegations were also maintained in a memorandum of 2 December 1996.

4. Following the complainant's appeal the regional Board recommended in a report dated 14 March 1997 to the Regional Director that:

(a) the complainant be reintegrated into the Organization and a post commensurate with her qualifications, training and experience offered to her;

(b) the memoranda dated 15 November and 2 December 1996 be removed from all her personal files.

5. On 25 March 1997 the Regional Director informed the complainant that he had accepted the Board's recommendations and that the first one had already been implemented.

6. Not having accepted the offer of a P.2 post in the Regional Office, the complainant's contract came to an end on 31 March 1997. She appealed to the headquarters Board against the decision of the Regional Director. It concluded that the abolition of the complainant's post was justified and that the reduction-in-force procedure had been correctly carried out. It said, inter alia, that the failure to provide the complainant with a suitable reassignment and the decision to terminate her appointment were "tainted with prejudice". The Board recommended in particular that she be allowed to choose between reinstatement or compensation, that the memoranda dated 19 July and 15 November 1996 should be removed from the complainant's personal files and an explanatory note inserted, that she receive 10,000 Swiss francs for moral injury and 2,500 francs for legal expenses with interest on all sums awarded.

7. In his decision dated 12 June 1998 – the one impugned – the Director-General stated that the memoranda of 19 July and 15 November 1996 had been removed from her files. He did not accept inserting an

explanatory note since this would only draw attention to documents that were no longer part of her files. He agreed to an award of 1,500 francs for certifiable legal expenses, but did not accept the recommendations for reinstatement, compensation for moral injury or interest. He said:

> "Your appointment was not terminated by the Organization. It was your decision to resign from the Organization effective 1 April 1997. Therefore, I do not consider there is a basis for either your reinstatement or granting you compensation of a sum equivalent to two years' salary. The fact is that you accepted a reassignment to Kigali following a period of three and a half months of leave without pay. Had you not had reservations regarding the post in Kigali when Director, Personnel brought it to your attention in his letter of 15 March 1996, your reassignment would have been effected much earlier thus avoiding the leave without pay. Furthermore, even if the Kigali post was at one grade lower than what you had held before, you were placed at step 15 of grade P.3 in order to protect your salary at the P.4 level, which in fact provided slightly higher earnings. Therefore, your reassignment to Kigali did not represent a loss in salary."

8. In her pleadings the complainant raises many matters. She refers to the original appeal to the regional Board impugning the decision to terminate her appointment pursuant to the "flawed" reduction-in-force procedure, the failure to place her elsewhere after the abolition of her post, the personal prejudice towards her of the Director of the Regional Office for Africa, the WHO's failure to follow its own procedures, the Organization's attempt to "reconstitute" her abolished post with another title under a different post number, discriminatory action towards her on the basis of her gender and origin, and unjust treatment of her.

9. The Administration responded at length and in detail to the complainant's arguments, even those it considered immaterial to the complaint. It claims that the decision to abolish the complainant's post was taken for objective purposes; it made efforts to reassign her and ultimately she accepted an offer; termination was never carried out; and the allegations of personal prejudice are unfounded.

10. In the opinion of the Tribunal the complaint is directed towards quashing a decision of termination which was never implemented. After submitting her internal complaint, the complainant accepted of her own free will a reassignment to another post. Her appointment was never

terminated. Her contract of employment came to a natural end on 31 March 1997 and at her request was not renewed.

11. While the complainant afterwards regretted opting for reassignment, that does not alter the fact that this complaint requests redress for a decision which was never implemented and which has long since ceased to have any relevance since it was superseded by her reassignment. The quashing of that decision is therefore without purpose.

12. The complainant is therefore not entitled to have either the impugned decision, dated 12 June 1998, or the decision of termination of 29 April 1996, set aside. Her subsidiary claims set out at B above for reinstatement, damages and consequential relief also fail. Her other claims for relief did not form part of the original internal appeal: since they are neither subsidiary nor consequential they must also fail as being irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

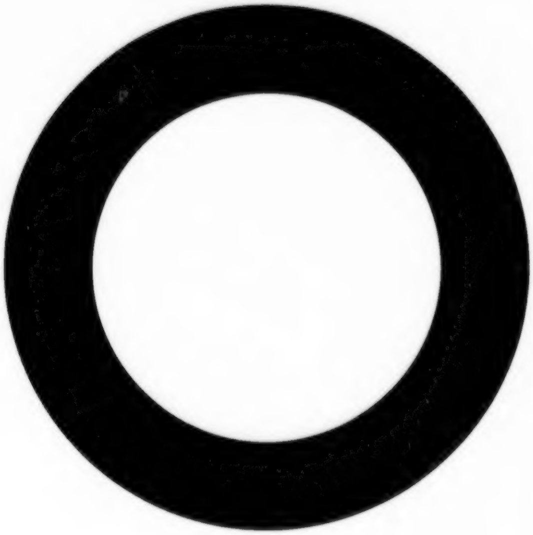
Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET



Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Beaucent**

Judgment 1929

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Thierry Beaucent against the Universal Postal Union (UPU) on 25 January 1999, the UPU's reply of 30 March, the complainant's rejoinder of 28 April, the Union's surrejoinder of 7 June, the observations provided by Mr Achim van der Weg on 26 August at the invitation of the Tribunal, the complainant's additional submission of 22 September and the Union's further comments dated 7 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is Swiss and was born in 1952, entered the staff of the International Bureau of the UPU on 26 April 1993 as assistant counsellor responsible for strategic planning at grade P.4. After being appointed to the post of Head of the Finance Section, he was promoted to counsellor at grade P.5 on 1 June 1997.

On 23 February 1998, the Deputy Director-General, as the complainant's first-level supervisor, completed his performance appraisal and career plan report for the period 1 January 1997 to 31 December 1997. He gave him the overall rating "good".

On 30 July 1998, external consultants, contacted at the request of the Council of Administration to carry out a study "evaluating the structuring of the UPU", submitted their report. Their recommendations included the merging of the Informatics and Data Base Section and the Postal Technology Centre. On 28 August 1998, the Deputy Director-General informed the complainant that the above merger would take effect on 1 September. In the context of the merger, the former Head of the Informatics Section, Mr van der Weg, was appointed Head of the Finance Section in place of the complainant. The latter was transferred to the Postal Technology Centre. The Deputy Director-General also sent him a letter the same day enumerating a number of criticisms of his performance. On 17 September, the complainant replied to the Deputy Director-General's letter. In a minute of 22 September, the complainant requested the Director-General to reconsider the decision to transfer him. In a letter dated 16 October, the Deputy Director-General replied to the complainant's letter of 17 September and informed him that his position remained unchanged. By a letter of 19 October, the Director-General informed the complainant that he upheld the decision to transfer him to the Postal Technology Centre.

On 6 November, the complainant appealed to the Joint Appeals Committee. In its report dated 10 December, the Committee concluded that the lack of confidence in the complainant was sufficient reason to justify his transfer and recommended that the Director-General maintain his decision. In a letter dated 11 December 1998, which is the impugned decision, the Director-General confirmed the transfer of the complainant.

B. Based on the case law of the Tribunal, the complainant has several pleas.

He deduces from the letter of 28 August 1998 that an investigation was carried out without his knowledge and that it did not comply with any of the applicable criteria.

He contends there was misuse of authority. The investigation carried out involved monitoring his hours of work by means of the computerised security system, which had been installed for the sole purpose of reinforcing the protection of property and persons. He says that the use of the data obtained through this system for a purpose other than such protection is "unlawful". The investigations and the interpretation of their results reveal the existence of a disciplinary procedure against him.

The complainant also alleges personal prejudice against him by the Deputy Director-General. By way of evidence, he refers to his change in attitude between 23 February 1998 (when he gave him the evaluation "good") and 28 August 1998 (when he made "the most severe criticisms" against him). With regard to the letter of 28 August 1998, he alleges errors of fact and of law, the failure to take into account relevant facts and the clearly mistaken conclusions drawn from the evidence. Moreover, he considers that the terms used by the Deputy Director-General caused him "very grave moral injury". He says that the Deputy Director-General also made "precise threats" intended to dissuade him from appealing.

Furthermore, the complainant endeavours to prove that his transfer constituted in practice a hidden disciplinary sanction. He also submits that the impugned decision is contrary to the interests of the Union on the grounds that the jobs attributed to Mr van der Weg and to himself did not correspond to their respective qualifications.

As a subsidiary plea, he contends that he suffered an interruption of the automatic progression of his career. Pursuant to a decision of the Executive Council of 1978, which has been applied uniformly over the past twenty years and which, he says, constitutes an acquired right, the head of a section is appointed counsellor at grade P.5 and, after a period of five years, is promoted to senior counsellor at grade D.1, without any change of functions or responsibilities.

The complainant requests the Tribunal to: set aside the administrative investigation of his case; order the withdrawal of the challenged documents from his personal file; recognise that he has been the victim of prejudice and misuse of authority; quash the decision to transfer him and order his reinstatement in his previous duties; and order that he be paid 60,000 Swiss francs in moral damages, 50,000 francs in "professional damages", 208,000 francs in material damages and 20,000 francs in costs.

C. In its reply the Union contests the receivability of several of the complainant's claims on the grounds that they are new. These are his claims seeking the setting aside of the investigation which the complainant says was conducted against him (the Union denies that such an investigation took place), the withdrawal of the challenged documents from his personal file and the compensation for moral damages. It adds that requesting the Tribunal to recognise that he has been the victim of prejudice and misuse of authority is merely a "personal and gratuitous interpretation by the complainant" and does not constitute a claim.

Referring to Regulation 1.2 of the Staff Regulations of the International Bureau of the UPU, it explains that: "Staff members shall be subject to the authority of the Director-General, who may assign them, in accordance with their qualifications, to any of the activities or offices of the Bureau". The decision to transfer the complainant was taken in the context of a restructuring of the Bureau, recommended by external consultants. It cannot be of a disciplinary nature, since transfer is not one of the disciplinary measures enumerated in Regulation 10.2 of the Staff Regulations. Moreover, the Joint Appeals Committee shared the general management's opinion that the former Head of the Informatics Section, as well as the complainant, had the necessary qualifications to discharge their new functions.

The Union contends that the complainant was not the subject of a disciplinary procedure. Besides, the fact that the Deputy Director-General kept a file containing "supporting documents" is proof that there was no prejudice against the complainant. The Union recalls that his appraisal report of 23 February 1998 was not without criticisms towards him and recognises that the loss of confidence resulting from the shortcomings observed on the part of the complainant could have "influenced" the decision of the Director-General. The reasons for the transfer were communicated to the complainant and, in accordance with its case law, the Tribunal only has a limited power of review over that decision.

The Union explains that there is no automatic promotion. The Executive Council decided that certain criteria, such as the quality of the work performed, efficiency, experience and professional knowledge had to be demonstrated for promotion to senior counsellor. It doubts that the complainant meets these criteria. Furthermore, in 1998 the UPU adopted a new system of classification of Senior and Professional category posts, which led to the repealing of the 1978 decision of the Executive Council according to which the Head of the Finance Section is established at grade P.5. It therefore maintains that he suffered no material injury.

The Union adds that there was no abuse of authority, since the computerised security system was only used to verify whether the complainant in practice worked overtime hours.

D. In his rejoinder the complainant submits that he put forward all his claims in his internal appeals but the Union did not respond to them.

The shortcomings noted while he was Head of the Finance Section were due to the shortage of staff and several decisions taken by the Director-General, which did not help him achieve the objectives established.

By its very nature, a hidden disciplinary sanction is not envisaged by the Staff Regulations. The role of the Tribunal is precisely to determine whether a measure constitutes a hidden sanction and to provide redress.

The complainant emphasises that the UPU never provided "clear reasons" for its decision to transfer him and that the Joint Appeals Committee considered that the decision was contrary to the interests of the Union.

He contends that the new system of classification of Senior and Professional category posts is not yet being "applied in practice".

He submits that the Union only transferred him with a view to reassigning Mr van der Weg after that official's section had been abolished.

E. In its surrejoinder the Union observes that the complainant has not produced any new evidence in his rejoinder which would make it modify its position. It presses its arguments and indicates that, although the introduction of the new classification of Senior and Professional category posts was delayed, it is now in force.

It submits that the complainant cannot complain of a shortage of human resources in the Finance Section, since he was responsible for this situation due to his attitude.

F. In his observations Mr van der Weg submits that the transfer of the complainant, which is the outcome of a "combination of circumstances", has to be understood as a professional necessity and not a disciplinary measure. He emphasises that the complainant works better "in a *solitary* environment". He is not very "skilled in interpersonal relations", which is an essential qualification for personnel management.

Mr van der Weg adds that in mid-August 1998 the Director-General informed him, in a confidential discussion, of the problems in the Finance Section and asked him if he would be prepared to take over the complainant's post. He accepted this proposal.

G. In his additional submission the complainant affirms that the reference made by Mr van der Weg to a confidential discussion with the Director-General destroys the Union's argument that the decision to transfer him was taken on 28 August 1998. He says that his transfer was not, therefore, the outcome of a combination of circumstances.

He adds that, in the past, he has successfully collaborated with several working groups, which refutes the allegations concerning his solitary nature.

H. In further comments, the Union explains that it did not offer the post of Head of the Finance Section, then occupied by the complainant, to Mr van der Weg. The discussion between the Director-General and the latter was of a "purely exploratory nature".

CONSIDERATIONS

1. The complainant, who is Swiss and was born in 1952, entered the staff of the International Bureau of the Universal Postal Union (UPU) on 26 April 1993 as assistant counsellor responsible for strategic planning at grade P.4 for a probationary period of two years. He was appointed a permanent official as of 1 April 1995.

After being selected for the post of Head of the Finance Section he was promoted counsellor at grade P.5 with effect from 1 June 1997. In this post, he was confronted with difficulties with his subordinates and the period was characterised by tension between the complainant, on the one hand, and the Deputy Director-General and Director-General, on the other.

The Deputy Director-General gathered additional information on the complainant's performance and opened a file on the matter without informing him.

On 30 July 1998 the Director-General received a report which had been requested by the Council of Administration and entrusted to external consultants. They recommended an in-depth reorganisation of the structuring of the UPU, which still required preliminary studies. Some of the proposed measures could only therefore be adopted after the Universal Postal Congress, to be held from 23 August to 15 September 1999. In addition to their principal recommendation, the consultants also proposed the merger of the Informatics and Data Base Section and the Postal Technology Centre. According to the consultants,

> "information, as a means of disseminating the latest developments in the postal services sector, is an essential resource for the UPU. The merger of the Informatics and Data Base Section with the Postal Technology Centre would form part of a strategy to introduce the methods of teamwork proposed above (= ad hoc groups) and would make it possible to achieve eventual synergies between the capacities of these two groups. This could also have the effect of increasing the capacity of the IB (= International Bureau) to provide information services to member countries and to its governing bodies."*

In consultation with the Management Committee of the International Bureau of the UPU, the Director-General decided to apply this recommendation immediately, with effect from 1 September 1998, so that the new structure would already be operational by the time the Council of Administration met in October 1998. Being not very satisfied with the complainant's performance and conduct, the Director-General decided to assign him to the Postal Technology Centre and to transfer Mr van der Weg, former Head of the Informatics Section, to the post of Head of the Finance Section.

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* Registry's translation

On 28 August 1998, in a very brief meeting, the Deputy Director-General informed the complainant of his transfer to the Postal Technology Centre with effect from 1 September 1998. On the same occasion, he transmitted to him a detailed seven-page letter, with thirty-four annexes attached (resulting from the investigation which he had undertaken) enumerating a series of criticisms of the complainant's professional performance and conduct, which were found wanting. The letter concluded as follows:

> "I wish to draw your attention to the need to take very seriously the criticisms set out in this letter and request you to modify urgently your professional conduct and relations, failing which I will be obliged to envisage other appropriate measures in accordance with the Staff Regulations."

When the complainant was informed of his transfer, the new post to which he was to be assigned had not yet been determined. He subsequently reported to the Head of the Postal Technology Centre as Manager of Internal Operations and Planning, without any subordinate officials, according to the post description of 16 September 1998 and the organisational chart of 1 October 1998.

Within the time period which he had been granted, the complainant replied to the Deputy Director-General on 17 September 1998 with supporting documents. In short, he refuted the criticisms levelled against him and announced that he would appeal against the grave disciplinary sanction constituted, in his view, by his transfer.

On 22 September the complainant requested the Director-General to reconsider the matter. The latter declared such a re-examination unjustified on 19 October and explained the reasons for the restructuring measures and the changes in personnel.

On 6 November the complainant appealed to the Joint Appeals Committee which, in its report of 10 December, considered that:

> "The circumstances in which this decision was notified to the complainant give grounds for believing that it consisted in effect of a hidden sanction and that the party concerned rightly believed that his dignity had been injured. The [Appeals Committee] understands the human and personal distress that the complainant may have suffered."

However, the Committee admitted that the complainant had committed serious faults and considered that the transfer was justified. It recommended that the appeal be dismissed. The Director-General so decided on 11 December 1998.

2. The complainant seeks the setting aside of the administrative investigation, the withdrawal of the challenged documents from his personal file, "recognition of prejudice and abuse of authority by the general management", the quashing of the decision of his "compulsory transfer" and his reinstatement in his previous duties, 60,000 Swiss francs in moral damages, 50,000 francs in "professional damages", 208,000 francs in material damages and 20,000 francs in costs. In short, he refutes the criticisms levelled against him and holds that his compulsory transfer was a hidden disciplinary sanction.

The Union maintains that all the complainant's claims are either irreceivable or devoid of merit. In its view, the letter of 28 August 1998 bore no relation to the decision to transfer the complainant. The letter was a mere warning intended to improve his conduct and performance or, failing that, to lead to a possible disciplinary procedure. The transfer was decided upon in the interests of the Union, taking into account the need for rationalisation and the abilities of the various officials concerned. The past performance of the complainant was only taken into consideration for the purpose of assessing his abilities.

Receivability

3. The complainant's claims for the administrative investigation to be set aside and certain documents to be withdrawn from his personal file are raised for the first time and are therefore irreceivable.

His claim that there was misuse of authority and prejudice in practice relate to the merits of the decision. But it is not in the interests of the complainant to seek a ruling in law thereon, when in practice he can obtain the quashing of the decision and redress.

His financial claims are not irreceivable insofar as they are closely related to the setting aside of the impugned decision, which is the principal claim.

The merits

4. The right of the Union to decide upon a compulsory transfer which is in its interests (see Regulation 1.2, paragraph 1, of the Staff Regulations) is rightly not contested.

5. Precedent has it that such a decision is at the Director-General's discretion. In principle, an organisation is the judge of its own interests and the Tribunal will not substitute the organisation's views with its own; it will not interfere unless the decision is *ultra vires*, or there is a formal or procedural flaw or a mistake of law or of fact, or some material fact has been overlooked, or some obviously wrong conclusion drawn from the evidence, or there is misuse of authority. (See, for example, Judgments 1496 (*in re* Güsten) under 7; 1757 (*in re* Hardy No. 4) under 4; and 1862 (*in re* Ansorge No. 2) under 5.)

6. However, compulsory transfer, in the manner in which it is processed, ordered and notified, must not needlessly harm the interests of the staff member, and particularly his dignity, nor cause him unnecessary hardship. And the decision must follow a proper enquiry. (See Judgments 1496, under 8; 1726 (*in re* Mogensen) under 24; 1779 (*in re* Feistauer) under 12 and 13; and 1862, under 6.)

7. Furthermore, compulsory transfer of a disciplinary nature must afford the staff member the safeguards available in the case of disciplinary sanctions, that is the right of the staff member to be heard before the sanction is ordered, with the option for him to participate in the full processing of the evidence and to make all his pleas (see the above judgments).

It matters little in this respect whether or not transfer is envisaged among the disciplinary sanctions set out in the Staff Regulations. What is decisive is whether the transfer appears to be the consequence of the alleged professional shortcomings of the staff member which may, by their nature, give rise to disciplinary sanctions.

It may be added that the protection provided to staff members against transfers which constitute disciplinary sanctions does not prevent organisations from carrying out the transfers which may be necessary in their interests. Where such measures are not urgent, they could be delayed until the staff member concerned is able to express an opinion and organise a defence before the measure is taken. In urgent cases, provisional measures could be adopted which do not prejudice the material decision.

8. In the present case, the Union contends rather unconvincingly that the compulsory transfer (an administrative measure necessitated by the restructuring) was totally unrelated to the professional criticisms levelled at the staff member in the letter of 28 August 1998, which might subsequently lead to a disciplinary procedure. In fact, the compulsory transfer and the letter were communicated to the staff member on the same occasion on 28 August 1998 during a brief interview. The fact that the Deputy Director-General had already carried out an investigation and established a file in support of these criticisms on that occasion also gives grounds for believing that they played an important role in the Director-General's decision to go ahead with the compulsory transfer. In its reply, the Union also indicates that:

> "the shortcomings observed over several months, which are enumerated in that letter, contributed to the deterioration in the climate of confidence between the management of the International Bureau and Mr Beaucent, which may also have influenced the choice of the Director-General."

Moreover, in a letter to the complainant of 16 October 1998, the Deputy Director-General agreed that the criticisms made "may no longer have the same importance since your transfer to the Postal Technology Centre". This confirms that they were to a great extent behind the decision to transfer the complainant and that they were also intended to justify that decision. For its part, the Joint Appeals Committee considered that "the circumstances ... leave the impression that it was in practice a hidden sanction", without, however, drawing the conclusion that the complainant's lawful right to a hearing had not been respected. It also noted that it had not perceived "any element which would justify the sudden nature of the transfer".

The restructuring measure is not contested, nor is it open to criticism by the Tribunal; it gave rise to the abolition of a section and the post of head of the section. The Director-General took advantage of the measure to transfer the head of the section which had been abolished to the post occupied by the complainant and to transfer the latter, whose performance and conduct he considered did not give satisfaction to the Union.

The material decision was therefore of a mixed nature. It was motivated, on the one hand, by the restructuring and the concern for the effective use of human resources and, on the other hand, by the complainant's performance and conduct, which were deemed unsatisfactory.

In objective terms, the new assignment, as it was presented, could also appear to be less interesting and prestigious than that of the head of the section from which the complainant had been removed, even though he retained his grade and pay. In effect, he was removed from a post of confidence in which he managed several colleagues and, at the time he was informed of the transfer, the new post to which he was assigned had not yet been determined. He had grounds for fearing that the new post offered fewer opportunities for career development.

The element of sanction inherent in the transfer was borne out by the brutal manner in which it was announced and put into effect. While the concern to carry out the restructuring rapidly is easily understandable, it is neither argued nor proven that a permanent transfer was so urgent that it prevented any consultation with the persons concerned. The sudden announcement of a transfer to a post which could be considered inferior, coming into effect a few days later, without prior notice or consultation, therefore wounded the complainant's dignity. This was rightly noted by the Joint Appeals Committee. The circumstances were such that the complainant perceived the measure as a sanction linked to the grievances levelled against him.

9. Taken together, the material circumstances give grounds for considering that the impugned transfer partly constituted a hidden disciplinary sanction.

As it was not accompanied by the protective measures required before the imposition of disciplinary sanctions, the complainant's right to a hearing was not respected. The opportunity which he was subsequently granted to express his views was not sufficient to redress the consequences of this procedural flaw. In view of the formal nature of this right, there is no need to establish whether the challenged measure was materially justified.

The impugned decision must, therefore, be set aside and the procedure resumed from the point at which it was flawed, through the application of the relevant terms of Staff Regulations 10.1 to 10.3.

This judgment does not prevent the Director-General from taking the measures necessary to safeguard the proper functioning of the service until a final decision can be made: see Judgment 1771 (*in re* De Riemaeker No. 4) under 4(a), and the precedents cited therein.

It does not prejudice in any way the decision to be taken on the merits.

10. The complainant's financial claims are premature, since the Tribunal cannot yet rule on the merits of the decision. The unlawful nature of the impugned decision and its consequences would undoubtedly justify the granting of moral damages already at this stage. However, the gravity of the case may be assessed differently, depending on whether or not the Union has a valid reason for carrying out the transfer. Therefore, it appears preferable to send the case back on this point as well.

Having succeeded, as the case currently stands, the complainant is entitled to costs, which may be set at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 11 December 1998 is set aside.
2. The case is sent back to the Director-General so that it can be resumed as indicated under 9 and 10.
3. The Union shall pay the complainant the sum of 5,000 Swiss francs in costs.
4. All his other claims are dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Laperrière** **Judgment 1930**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Nicole Laperrière against the World Health Organization (WHO) on 25 January 1999 and corrected on 4 March, the WHO's reply of 7 June, the complainant's rejoinder of 30 July and the Organization's surrejoinder of 13 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is a French national and was born in 1949, joined the staff of the WHO on 1 April 1974 as an Administrative Assistant at grade G.6 in the Special Programme of Research, Development and Research Training in Human Reproduction (HRP). She was first employed under two-year contracts, then five-year contracts, the last of which was due to come to an end on 31 March 1999.

Following the decision to abolish posts in the Programme for financial reasons, the Administration informed the complainant by a memorandum of 23 April 1996 that her post would be abolished and that her appointment would be terminated on 31 July 1996, in accordance with

Staff Rule 1050.1. She subsequently obtained leave without pay in place of termination and maintained her status as a member of the staff until 31 January 1997, the date on which the termination of her appointment took effect.

On 21 June 1996, she lodged an appeal with the headquarters Board of Appeal against the decision to terminate her appointment. By a memorandum of 25 September 1996 she withdrew her appeal.

On 21 October 1997, an information circular informed the staff of the WHO that, pursuant to Judgments 1624 to 1631 (*in re* Clements, Gray, Lewis, Ratcliffe, Sato, Schopper, Stoneburner and Wabitsch), delivered by the Tribunal on 10 July 1997, a reduction-in-force exercise was being undertaken from which former staff members of the Global Programme on AIDS (GPA) could benefit if they were in the same situation as the staff members whose rights had been recognised in the above judgments. The document also outlined the elements on which the size and extent of the above exercise would depend.

In a letter of 14 November 1997 to the Director of the Division of Personnel, the complainant, referring to the above circular, requested to benefit from the so-called "GPA" judgments. By a letter of 19 November 1997, the Chief of the Contract Administration and Information Unit replied that the provisions of the circular only applied to former GPA staff members.

On 23 March 1998 the complainant appealed to the headquarters Board of Appeal. In its report of 23 August 1998, the Board of Appeal concluded that the complainant was in the same factual situation as the staff members of the former GPA whose entitlement to the reduction-in-force exercise had been recognised by the Tribunal in the above judgments, since her post was not by its nature a "fixed-term" post. The Board recommended that the judgments be applied to her case. By a decision of 23 October 1998, which is the impugned decision, the Director-General rejected this recommendation.

B. Citing the circular of 21 October 1997, the complainant argues that Judgments 1624 to 1631 are applicable to her.

She contends that, according to the Tribunal's interpretation of the WHO Rules applied to GPA staff members, her post was not fixed-term. The termination of her appointment based on Staff Rule 1050.1, respecting the termination of a temporary appointment of a staff member engaged for a post of limited duration, was therefore unlawful.

She submits that during the reduction-in-force exercise, carried out following the above judgments, staff members in a like contractual situation to her own, before the abolition of her post, had been included in the competition. She says that this implies the existence of a "right" to the reduction-in-force exercise. She claims the same treatment.

The complainant requests the Tribunal: (1) to set aside the Director-General's decision of 23 October 1998; (2) to quash the decision to terminate her appointment on 31 July 1996 and order her reinstatement in a post that is commensurate with her previous situation, or the application of the reduction-in-force exercise which was applicable at the time of the facts; (3) to grant her redress for all the losses suffered, including "salary, language allowance, merit increments, leave, pension fund, health insurance fund, etc.", since 1 August 1996, subject to the deduction of her earnings during that period, plus interest of 8 per cent per annum; and (4) to grant her 2,000 Swiss francs in costs.

C. The Organization contests the receivability of the complaint. It argues that, if the complainant intended to challenge the termination of her appointment, she should have appealed within sixty days of the receipt of her notification thereof, that is by 24 June 1996 at the latest, in accordance with Staff Rule 1230.8.3. She only lodged her internal appeal on 23 March 1998. The complainant was therefore time-barred and her complaint is irreceivable. The WHO adds that she also withdrew an appeal filed earlier challenging the termination of her appointment.

The Organization explains that it decided in accordance with the Manual that the post occupied by the complainant was fixed-term and that its abolition did not therefore require the application of a reduction-in-force exercise. If the complainant intended to challenge this position, nothing prevented her from pursuing her claims. But she did not do so.

With regard to the circular of 21 October 1997, the Organization explains that it clearly only intended to extend the application of the GPA judgments to former GPA staff members, provided they fulfilled the necessary requirements, and not to all the members or former members of the staff of the WHO. For this reason, only former GPA staff members received a communication informing them that they were free to submit an application to this effect. The complainant was in an entirely different situation. She was not assigned to the GPA and the decision to terminate her appointment had not yet been taken. None of the considerations which could justify the application of the GPA judgments to former staff members of that Programme is, therefore, applicable in the present case. If the complainant considered that she was in a like situation of fact and of law to a GPA complainant, nothing prevented her from filing an application to intervene. But she did not do so.

The WHO adds that in Judgment 1727 (*in re* Curina), delivered on 29 January 1998, and therefore later than the GPA judgments, the Tribunal dismissed a complaint filed by a staff member whose situation was identical in all major respects to that of the complainant in the present case. In both cases, the choice of the post to be abolished from among other posts of the same grade and nature was based on the quality of the performance of the staff members in those posts.[*] In Judgment 1727, the Tribunal found that the decision to abolish the post of the staff member concerned and to terminate her appointment without applying the reduction-in-force exercise was not flawed, in view of the limited duration of the post.

Finally, the WHO recalls the Tribunal's ruling in the GPA judgments that the decision to terminate the appointments of GPA staff members was invalidated by the absence of a specific decision to abolish each post in question. In the present case, a specific decision was indeed taken to abolish the post occupied by the complainant.

D. In her rejoinder the complainant indicates that she does not contest the termination of her appointment, as she had no choice but to accept the interpretation then given to the Staff Rules. However, she calls for the new interpretation of the concept "fixed-term" to be applied to her in an equitable manner. In this respect, she contends that the Tribunal's definition of the "concept" of the duration of posts has "quashed and invalidated" all the Administration's previous acts.

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[*] On this point, the WHO provides a series of documents as annexes..

She does not deny that the Organization did not undertake to extend the application of the GPA judgments to other staff members. Nevertheless she "calls on it to do so out of a concern for equity between the staff members of the same Organization, irrespective of the unit in which they work".

She argues that her situation was totally different from that of the staff member whose complaint was dismissed in Judgment 1727.

She refutes the "allegations made slyly in the form of annexes" in notes which she says have no legal value.

The complainant makes a new claim for compensation for moral injury in view of the annexes produced by the Organization, but withdraws her claim for costs.

E. In its surrejoinder the WHO rebuts the complainant's statement that the Tribunal's definition of the "concept" of the duration of posts has quashed and invalidated all the Organization's previous acts. It adds that the GPA judgments had the effect of quashing the decisions detrimental to GPA staff members, based on the evidence produced by them and their pleas. They were not generally applicable to all similar cases.

The WHO denies making allegations against the complainant. The facts of the case would not have been complete if it had not explained the reasons which led to the abolition of the post which she occupied.

CONSIDERATIONS

1. The complainant entered the staff of the WHO on 1 April 1974 and was employed under successive contracts, the last of which was due to come to an end on 31 March 1999. In 1995, the Special Programme of Research, Development and Research Training in Human Reproduction (HRP), where she was employed, experienced financial

restrictions and it was decided to abolish several posts, including that of statistical assistant which she occupied in the Statistics and Data Processing Unit. The complainant's post was abolished as of 1 August 1996 and her appointment was terminated as of 31 July 1996. The Administration subsequently converted the termination of her appointment into leave without pay, allowing the complainant to retain her status as a staff member until 31 January 1997.

2. On 21 June 1996, the complainant lodged an internal appeal with the headquarters Board of Appeal against the decision to terminate her appointment. However, on 25 September 1996, after receiving the Organization's reply, she informed the secretary of the Board of Appeal that she had "decided to withdraw [her] appeal for reasons and considerations unrelated to the merits of the case".

3. On 10 July 1997, the Tribunal delivered Judgments 1624 to 1631, in which it ruled that the posts of staff members of the WHO's Global Programme on AIDS (GPA) had been abolished unlawfully. The Organization subsequently issued an information circular, dated 21 October 1997, in which it informed the staff that a reduction-in-force exercise would be conducted and that "former GPA staff who consider that they have the same claim and are in the same fact situation as a complainant remain free to make a claim to the Director of Personnel, stating the full particulars of their claim, including its factual basis, and the remedy requested". The circular added that it was "essential that any fully justified written claims from former GPA staff be received by 21 November 1997".

4. Considering that she was in the same situation as the former GPA staff members whose posts had been abolished, on 14 November 1997 the complainant requested the application in her case of the provisions of the above circular; she sought the setting aside of the termination of her appointment, full compensation for her loss of earnings and a post commensurate with her previous situation, taking into account her experience and qualifications.

The Chief of the Contract Administration and Information Unit replied on 19 November 1997 that, since she had never been a member of the staff of the GPA, she could not benefit from the Tribunal's judgments, nor from the circular of 21 October. The complainant lodged an appeal with the headquarters Board of Appeal against this decision. The Board of Appeal, in a report dated 23 August 1998, recommended that the Director-General accede to her claims. The Board considered that the post occupied by the complainant continuously for over twenty years, without any specified duration, should not be deemed a "fixed-term" post, and that the complainant was, therefore, in the same factual situation as the former GPA staff members, whose right to a reduction-in-force exercise had been recognised by the Tribunal.

5. In a decision of 23 October 1998, the Director-General of the WHO refused to accept this recommendation. It is this decision which is being referred to the Tribunal for review. The complainant presses the arguments, which she put to the headquarters Board of Appeal, in support of her claims for the quashing of the decision terminating her appointment, her reinstatement or the application of the reduction-in-force exercise, and the compensation of the losses which she has suffered. She contends that, out of a concern for equity, the WHO should apply to her the favourable rules developed for GPA staff, since there are no grounds for maintaining that her contracts of appointment were fixed-term contracts. She therefore says that she was in a like legal situation to the former GPA staff members, whose right to benefit from a reduction-in-force exercise was recognised by the Tribunal.

6. On the issue of whether the decision to terminate the complainant's appointment as of 31 July 1996 was lawful, the Tribunal finds certain contradictions in the complainant's pleas. While in her initial submissions the complainant explicitly requested the quashing of this decision, she states in her rejoinder that she "does not contest the termination of her appointment", while at the same time adding that she was "a victim of her own weakness" for accepting "at face value the Administration's statements concerning her rights".

On this point, it must be recalled that the complainant withdrew the appeal which she had filed against the decision to terminate her appointment. She is now time-barred from challenging this decision, even if she should wish to do so. Moreover, she does not establish that she accepted the termination of her appointment under the influence of constraint, inadmissible pressure or false information.

7. Although the complainant cannot, therefore, challenge the decision to terminate her appointment, she may challenge the validity of the decision to refuse the application in her case of the provisions of the circular of 21 October 1997, by which the Administration, as an *ex gratia* measure and out of a concern for equity, undertook to re-examine the situation of former GPA staff members who were in the same situation as the officials whose claims had been recognised by the Tribunal in Judgments 1624 to 1631. However, the provisions of the above circular were clearly reserved for GPA staff members whose posts had been abolished and did not concern staff members in other programmes administered by the WHO, irrespective of the similarities of their situation. The Organization had not undertaken by any statement or act to extend the scope of the measures adopted for GPA staff to other members of the staff, or to re-examine earlier decisions affecting them in the light of the circular of 21 October 1997. It was not, therefore, under any obligation in law to re-examine the situation of the complainant, who was not covered by the above circular and who was, moreover, in a different situation in law and in fact to the staff members whose claims the Tribunal had recognised in its judgments of 10 July 1997, and whose situation the WHO had undertaken to re-examine. Any new fact deriving from these judgments was not such as to require the reopening of the cases of all staff members whose posts had been abolished, nor to confer new rights upon them.

8. The complainant takes the Organization to task for having annexed to its reply certain documents, which are unrelated to the case. These documents, which are not necessary to the outcome of the present case, have not been disclosed and are not to be divulged. Their

submission, which was moreover of no avail, does not give rise to any prejudice for which the complainant would be entitled to seek redress.

DECISION

For the above reasons,

The complaint is dismissed.

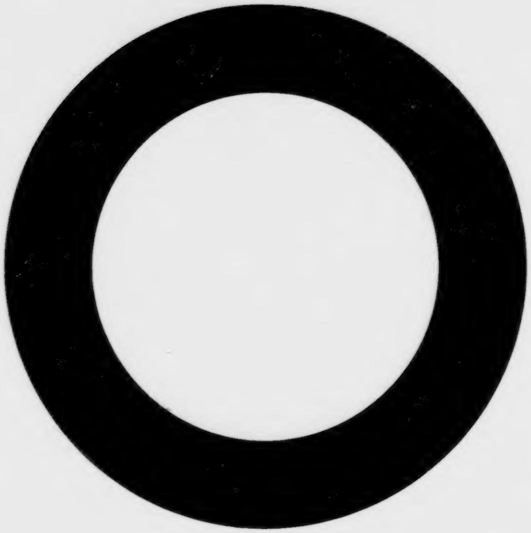
In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET



Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Baillet (No. 3)** **Judgment 1931**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Bernard Jean Raymond Baillet against the European Patent Organisation (EPO) on 24 February 1999, the EPO's reply of 14 May, the complainant's rejoinder of 28 June and the Organisation's surrejoinder of 30 September 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 64(1) of the EPO Service Regulations says:

> "Save as otherwise expressly provided in these Service Regulations, a permanent employee who is duly appointed shall be entitled to the remuneration appropriate to his category, grade and step. He may not waive his entitlement to remuneration."

Information on the complainant's career is to be found under A in Judgments 1547 (*in re* Baillet and others) of 11 June 1996 and 1618 (*in re* Baillet No. 2 and others) of 30 January 1997. Judgment 1663 (*in re* Bousquet No. 2 and others) of 10 July 1997 is also relevant although Mr Baillet was not a party in that case.

In order to settle once and for all a dispute about the adjustment of the pay of staff at the European Patent Office, the EPO's secretariat, the

Administrative Council took a decision, CA/D 4/96, on 8 March 1996. Under articles 3 and 4 of the decision, staff were to be paid a lump sum for the period from 1 July 1992 to 31 December 1995 on condition that they signed an "individual declaration" undertaking not to pursue any appeals under way against the application of the adjustment procedure and not to file any new ones. Article 6 of the decision provided for the addition to Article 64(1) of the Service Regulations of the following note: "This provision shall not invalidate the individual declaration concerning decision CA/D 4/96".

On 9 March 1996 the Salary Section sent the complainant a provisional "lump-sum payslip" for the period from July 1992 to December 1995 together with the above-mentioned individual declaration. The lump sum to be paid amounted to 16,804.59 guilders. Having failed to return the declaration the complainant did not receive the lump sum. By a letter of 29 May 1996 he asked the President of the Office to order the competent department to pay him the lump sum. On the same day an official of the Salary Section sent him a note stating that he had not yet received the complainant's signed declaration on the basis of which the lump sum was to be paid, and that a new declaration form would be sent to him which he should return before 7 June. Refusing to comply, in a letter of 31 May the complainant again asked the President to order payment of the lump sum or else to treat his letter as an internal appeal. By a letter of 19 July 1996 the Principle Director of Personnel told the complainant that his letter had been registered as an internal appeal.

The complainant's appeal having been joined to those of other EPO officials, the Appeals Committee held a first hearing at Berlin on 15 October 1997. In a letter of 17 October to the Chairman of the Committee the complainant, whose duty station was The Hague, objected that he had not been invited to attend the hearing. The Chairman replied in a letter of 4 November 1997 that only the appeals lodged by officials serving in Berlin had been dealt with at the hearing. By a letter of 5 November 1997 the Director of Personnel Development informed staff who had not signed the declaration that the President had decided to allow them to benefit from the terms of the ruling of Judgment 1663.

The Appeals Committee heard the complainant on 24 June 1998 at The Hague. In its report of 23 September, which covered the complainant's appeal and those to which it had been joined, the Committee recommended rejecting them as devoid of merit. By a letter of 30 November 1998, the impugned decision, the Director of Personnel Development informed the complainant that the President had decided to reject his appeal.

B. The complainant explains that the lump sum he claims is part of his remuneration within the meaning of Article 64 of the Service Regulations. It is therefore owed to him as a duly appointed official and he may not waive his entitlement to it.

The intent of the note added to Article 64 is contrary to that of the article itself because the aim of the note is to make payment of part of an official's pay dependent on his relinquishing his right to appeal. Having been introduced in March 1996 the note may not be applied retroactively to an amount due for the period from July 1992 to December 1995.

The Appeals Committee was wrong to have joined his appeal to those of other staff members. By so doing it failed to consider the particularities of his position and delayed the processing of his appeal. Furthermore, it disregarded the principle of equal treatment by excluding him from the hearing in Berlin.

He asks the Tribunal to quash the President's decision of 30 November 1998, to order the EPO to pay him the lump sum, to be worked out taking into account the application of Judgment 1663, i.e. 17,813.23 guilders plus interest on sums due since March 1996. He claims one euro in damages for the Appeals Committee's negligence in processing his appeal.

C. In its reply the EPO submits that the complaint is irreceivable. The complainant has no cause of action since the Organisation decided to pay him in their entirety the amounts resulting from the application of Judgment 1663. Obviously, the complainant's sole aim is "additional and unwarranted enrichment". Besides, at no point in the internal appeal procedure did he ask for the lump sum to be calculated taking into account the application of Judgment 1663. He did not submit his claim to interest on sums due within the time limit for internal appeals and his claim to compensation for the Appeals Committee's negligence was not submitted to the President.

In subsidiary pleas the EPO explains that to treat the lump sum as a part of the complainant's remuneration would be contrary to the terms of the Service Regulations, the Council's decision of 8 March 1996 and the individual declaration. Since the declaration stated that its purpose was to settle the salary dispute "by mutual agreement" the amount in question is "the result of a compromise". So to sign the declaration would not infringe the requirement not to waive entitlement to remuneration.

The Appeals Committee may hold separate hearings for appellants serving in different duty stations, and there is nothing preventing the Administration from submitting a single position on all the appeals. The delay in processing the complainant's appeal was due to the fact that the other appellants wanted more time to prepare their submissions.

D. In his rejoinder the complainant refutes the EPO's objections to receivability. He asserts that the lump sum he claims is not the pay adjustment that the President granted him pursuant to Judgment 1663.

He rebuts the EPO's explanations and points out that the Organisation took over a year to submit to the Appeals Committee its position on his internal appeal.

E. In its surrejoinder the EPO presses its pleas and submits that the internal appeal procedure, which lasted just over two years, was not "exceptionally long".

CONSIDERATIONS

1. In Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference is made and which related to a dispute concerning salary adjustments, the Tribunal upheld the complaint and invited the EPO to recalculate the adjustments. The judgment also benefited a number of staff members who had intervened in the complaint.

However, the great majority of the staff members had previously agreed to a proposed settlement envisaging a new method of calculation for the future and the payment of a lump sum by the European Patent Office to all staff who signed the individual declaration accompanying the proposal.

The EPO also granted the adjustment deriving from Judgment 1663 to staff members who, although they did not participate in the procedure leading to Judgment 1663 (as complainants or interveners), had not signed the individual declaration. The complainant, who was in this latter category, was informed of the measure on 5 November 1997.

In March 1996, he had received a provisional "lump-sum payslip" showing an amount of 16,804.59 guilders, bearing the indication "please return the signed declaration (original) to: Salary Section", with a declaration form attached. Without having signed the form, the complainant sent a request on 29 May 1996 to the President of the Office claiming payment of the lump sum. After the reason for its non-payment had been indicated to him (he had not signed the declaration), he wrote directly to the President claiming that the refusal to pay the sum was in breach of Article 64(1) of the Service Regulations. Considering that the request was devoid of merit, the President transmitted it to the Appeals Committee. Considering that the payment of the envisaged sum was purely in the nature of a settlement, the Administration called for the dismissal of the complainant's appeal, which had been joined to those made by twenty-four staff members with similar claims. It was only on 23 September 1998 that the Appeals Committee issued an opinion. It unanimously recommended dismissing the appeals. It considered, in particular, that staff members who had refused to sign the declaration did not appear to have suffered any prejudice, since they had obtained the full benefit of Judgment 1663. On 30 November 1998, in the impugned decision, the President dismissed the complainant's internal appeal.

2. The complainant claims the payment of the "lump sum impugned in internal appeal 33/96, calculated taking into account ... Judgment 1663, that is the sum of 17,813.23 Dutch guilders (8,083.30 euros), plus interest for the delay in payment since March 1996", as well as the token payment

of one euro "in damages for the Appeals Committee's negligence in processing internal appeal 33/96". He bases his claims on Article 64 of the Service Regulations, which he says entitles him to the payment of the lump sum, which forms part of the remuneration of staff members. He claims, in addition, that the adjustments deriving from Judgment 1663 are also owed to him.

The EPO contends that the complaint is irreceivable because the internal means of relief have not been exhausted and, in subsidiary argument, that it is devoid of merit. It asserts that the complainant did not ask the President for payment of both the lump sum and the adjustments deriving from Judgment 1663, nor did he claim compensation for the delays of the Appeals Committee. On the merits, the EPO submits that the claims are untenable. The lump sum was intended to grant the staff members a part of the contested adjustment. Since he obtained the whole of the adjustment, the complainant suffered no injury and cannot claim the payment of the lump sum as well. Even if the lump sum were due to him, it would have to be deducted from the amount payable in accordance with Judgment 1663.

3. The initial claim was made to the President at a time when the Tribunal had not yet delivered Judgment 1663. In his initial claim, the complainant did not envisage the possibility of the accumulated payment of both the lump sum and the full adjustment, which other staff members had claimed from the Tribunal.

The lump sum and the adjustment deriving from Judgment 1663 have the same purpose. In both cases they are intended to grant staff members an additional sum in respect of the adjustment of their salaries. The only difference is in their form. The lump sum takes the form of a settlement, while the adjustment resulting from Judgment 1663 is based directly on the Service Regulations, as interpreted by the Tribunal. However, both of them are intended to satisfy the same claim to the payment of a salary adjustment.

Since the Office recognised and paid to the complainant the total amount of the adjustment in accordance with Judgment 1663, that is the sum of 31,130.41 guilders, his claim no longer shows any cause of action.

The complainant wrongly pleads a breach of Article 64 of the Service Regulations. Although this provision states in paragraph 1 that "a permanent employee who is duly appointed shall be entitled to the remuneration appropriate to his category, grade and step" and that he "may not waive his entitlement to remuneration", and, in paragraph 2, that "remuneration shall comprise basic salary and, where appropriate, any allowances", this does not in any way invalidate the argument that the lump sum and the adjustment deriving from Judgment 1663 are of the same material nature.

The issue of whether, if the judgment had not come out in their favour, the staff members who had not signed the individual declaration would have been able *ex post facto* to benefit from the lump sum proposed under that settlement, is therefore no longer of any relevance.

The complainant's present complaint is clearly vexatious, as he undoubtedly realises. For the above reasons, which are also set out in Judgment 1932 (*in re* Vollering No. 17) of this day, the complaint must fail.

4. The complainant, not without reason, raises the issue of the delays by the Appeals Committee. However, even though he was undoubtedly entitled to a decision, these delays caused him less injury insofar as his complaint no longer showed any cause of action. After an inadmissible delay, he was entitled in accordance with the case law to refer the matter directly to the Tribunal: see Judgments 1674 (*in re* Gosselin) under 6; 1684 (*in re* Forté) under 3; and the judgments cited therein. However, the delays in the procedure could be explained in part by the need to find a solution to the dispute relating to salaries within the Office. In the present case, they also allowed the EPO to find a solution whereby the complainant obtained the full adjustment that he claimed.

In these circumstances, there is no need to award the complainant token damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Vollering (No. 17)** **Judgment 1932**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventeenth complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 26 February 1999 and corrected on 6 April, the EPO's reply of 14 May, the complainant's rejoinder of 18 June and the Organisation's surrejoinder of 10 September 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1952, is a patent examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, at The Hague.

Facts relevant to the present case are set out under A in Judgments 1663 (*in re* Bousquet No. 2, Gourier and Vollering No. 11), of 10 July 1997, and 1931 (*in re* Baillet No. 3) delivered on this day.

On 9 March 1996 the complainant received a copy of the individual declaration entitling him, on condition that he returned it duly signed, to the payment of a lump sum intended as a compromise to settle the collective dispute over the adjustment of pay. By a letter of 31 May the complainant informed the President of the Office that he refused to sign the declaration and requested him to transfer the lump sum to him nevertheless. If the President did not meet this request, he asked him to consider the letter as lodging an internal appeal. In a letter of 19 July 1996 the Principal Director of Personnel informed the complainant that his request could not be granted and that his letter had been registered as lodging an internal appeal. The Appeals Committee issued its opinion on 23 September 1998. It recommended rejecting the complainant's appeal, as well as those to which it had been joined, as being devoid of merit. By a letter of 30 November 1998, which is the impugned decision, the Director of Personnel Development informed the complainant that the President had decided to reject his appeal.

B. The complainant contends that the President's decision to withhold from certain employees the benefit of the "collective agreement" which brought an end to the pay dispute constitutes an abuse of the agreement.

The complainant says that he did not sign the individual declaration because the conditions enumerated therein are unlawful. Citing the case law of the Tribunal, he explains that the President is not empowered to attach to the payment of the lump sum any condition that is not warranted by Article 64 of the Service Regulations of the EPO. He asserts that the above sum forms part of his remuneration. Indeed, under the terms of Article 64, he may not waive his entitlement to remuneration. At the risk of showing misuse of authority, the President could not therefore withhold this sum from him, nor exert pressure on him to waive his entitlement to it. Having been placed under "unacceptable" financial pressure, the complainant considers that he was blackmailed. He adds that the President exerted unlawful pressure on the members of the General Advisory Committee to deliver a decision that was fast, unanimous and favourable to the Administration.

The complainant contends that the staff members who did not sign the declaration were the victims of discrimination. He adds that the staff of the EPO employed in Vienna received the lump sum, even though they had not challenged the salary method applied between July 1992 and 1996. They were therefore "bribed".

He requests the Tribunal:

(1) to quash the President's decision of 30 November 1998 and order the payment to him of the lump sum, plus interest of 10 per cent per annum;

(2) to condemn the President for the intentional abuse of Article 64 of the Service Regulations and for requesting the signing of the "illegal conditions" set out in the individual declaration; and to grant 5,000 guilders for the moral injury he suffered;

(3) to condemn the President for blackmail or bribery, or for attempted blackmail or bribery; and to grant him compensation for the moral injury suffered thereby;

(4) to condemn the President for discrimination against him, as well as abuse of the collective agreement, and to grant him 10,000 guilders for the moral injury suffered;

(5) to grant him 10,000 guilders in costs.

C. In its reply the EPO asserts that the complaint is irreceivable. In accordance with the principle *non bis in idem*, the complainant may not continue to claim the payment of the lump sum without first signing the individual declaration. As a party to the case which led to Judgment 1663, he received from the EPO all the sums deriving from the execution of that judgment. His claim therefore shows no cause of action, since the amount of the sums which he received was almost twice what he would have received had he signed the declaration. His claims for compensation are irreceivable because he did not exhaust the internal means of relief within the time limits.

In subsidiary argument, the EPO explains that the complainant's allegations concerning abuse of a collective agreement are irrelevant.

The complainant was not one of the staff representatives on the General Advisory Committee. The alleged pressure exerted on the latter cannot, therefore, have caused him moral injury.

The EPO reaffirms that the individual declaration is lawful. The case law cited by the complainant is not relevant to the present case since it relates to a fundamentally different situation. His contention that the lump sum is a component of remuneration goes against the wording of Article 64 of the Service Regulations. If it had been part of his remuneration, it would have been deducted from the sum that he received as a result of Judgment 1663. The EPO concludes that it was indeed possible to place certain conditions on the payment of the lump sum.

It contends that the complainant was not a victim of discrimination, because he put himself in a situation which was different from that of the staff members who had signed the declaration. It adds that the staff in Vienna only received a reduced lump sum. It also refutes the accusations of blackmail.

D. In his rejoinder, the complainant rejects the explanations made by the EPO. By failing to define clearly the nature of the lump sum, the EPO recognised that it was a component of remuneration.

E. In its surrejoinder the EPO presses its arguments.

CONSIDERATIONS

1. The complainant attacks a decision by which the President of the European Patent Office accepted the recommendation of the Appeals Committee and dismissed his internal appeal against the decision of the Administration to require him, in March 1996, to sign a declaration as a condition of receipt of a lump-sum payment in settlement of an outstanding dispute relating to salary adjustments.

2. At the time of the original decision to require such a signature, the EPO and its staff had been engaged in a continuing dispute over the propriety of the changes, which had been put into effect from 1 July 1992, to the method of salary adjustment which had been in force since 1988. That dispute was already the subject of internal appeals. The present complainant was also a complainant in the proceedings which ensued before the Tribunal. A full history of the dispute and the surrounding circumstances can be found in Judgment 1663 (*in re* Bousquet No. 2, Gourier and Vollering No. 11).

3. While the complainant's internal appeal in the present matter was still pending the Tribunal issued Judgment 1663 in July 1997, which largely upheld the complainants' position, and found that the new method of calculating salary adjustments "infringed the staff's right to the adjustment due" under the 1988 procedure. The matter was remitted to the Organisation with instructions that the latter "take new decisions accordingly, in the complainants' and interveners' favour, as from 1 July 1992". That judgment has now been executed and the complainant has received an amount of 32,694.33 guilders.

4. It might have been supposed that the ruling in Judgment 1663 in his favour would have had the effect of causing the complainant to withdraw his internal appeal in the present matter. The payment of a lump sum was an abortive attempt by the Organisation to settle the then outstanding dispute with its staff, an attempt which the complainant clearly rejected. That dispute was subsequently definitively resolved by the Tribunal in the complainant's favour in Judgment 1663. What possible purpose could be served by determining the wholly theoretical question as to whether the Administration could or could not properly require the signing of the declaration as a condition of settlement of a dispute over salary when that dispute was itself no longer pending but had been finally resolved by the Tribunal? For those, like the complainant, who did not accept the offer of settlement, the latter was now clearly a dead letter and their rights had been determined by the terms of Judgment 1663.

5. Not so, however. The complainant has not only pursued his internal appeal through to a final administrative decision but has now carried that decision before the Tribunal. He seems to think that he is entitled not only to have the benefit of Judgment 1663 but also to take the lump sum which the Administration had previously offered in order to settle the same dispute while not granting it release from his claims, which was the condition it had imposed for such settlement.

6. The complainant is wrong. It is neither necessary for the Tribunal to take up his many pleas, most of which are irrelevant or inconsistent, or his new claims for damages against the President personally, nor to deal

with the defendant's plea of irreceivability. It simply does not matter now whether the Administration was right or wrong to require a signature on the declaration. It is equally unimportant to decide whether or not the present complaint, or any part of it, is receivable. Not even the complainant's allegations of improper procedures before the General Advisory Committee can now be of anything more than theoretical interest. It is enough to say that the complaint has become devoid of all object and is a clear abuse of the Tribunal's procedure. For the reasons set out above and in Judgment 1931 (*in re* Baillet No. 3) of the same day, the complaint must be dismissed.

7. Before concluding, the Tribunal would emphasise that it will not tolerate the waste of time and money caused by the pursuit of abusive and unnecessary procedures before it and will take towards those responsible any appropriate action, including awards of costs, if requested to do so.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Ousset**

Judgment 1933

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Jean-Bernard Ousset against the European Patent Organisation (EPO) on 11 March 1999 and corrected on 8 April, the EPO's reply of 2 July, the complainant's rejoinder of 19 July and the Organisation's surrejoinder of 21 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts material to the present case are set out under A in Judgments 1663 (*in re* Bousquet No. 2 and others), of 10 July 1997, and 1931, (*in re* Baillet No. 3) delivered on this day.

In the light of Judgment 1663 it became clear that, in the case of certain staff members, the remuneration paid on the basis of the salary scales deriving from decision CA/D 4/96 of the EPO's Administrative Council was lower than the pay which would have resulted from the application of the method in force, as interpreted by the Tribunal. On 23 October 1997, the President of the European Patent Office, the secretariat of the EPO, proposed to the Council the introduction of a safeguard clause providing for a compensatory allowance to correct this reduction in pay for the period January 1996-June 1996. The Council gave its approval in a decision dated 5 December 1997.

The complainant, who was born in 1954 and is of French nationality, is a staff member of the Office at grade A3, serving in Berlin. He was an intervener in the case which led to Judgment 1663.

By a letter of 4 November 1997, the Director of Personnel Development informed the complainant of the sum that was due to him in application of Judgment 1663, namely 30,414.35 German marks for the period between July 1992 and December 1995. At his request, the complainant was informed by the Salary Section by electronic mail on 18 November 1997 that Judgment 1663 had not resulted in the establishment of new salary scales, but merely in a recalculation of individual basic salary rates. The Salary Section proposed to establish "theoretical" pay slips for him.

By a letter of 28 January 1998, the complainant appealed to the President of the Office. Wishing to verify the correctness of the sums paid by the EPO in execution of Judgment 1663, he requested pay slips which were updated in line with the above judgment for the period July 1992-December 1995, and updated basic salary scales for the period July 1992-June 1996, that is up to the coming into force of the new method of reckoning salaries adopted by the Council. He lodged an appeal with the Appeals Committee, which issued its opinion on 23 September 1998 and recommended that the complainant's remuneration should once again be recalculated, as of 1 July 1996, and that any resulting arrears should be paid. By a letter of 14 December 1998, which is the impugned decision, the Director of Personnel Development informed the complainant that the President had decided to dismiss his appeal.

B. The complainant recalls that in Judgment 1663 under 12, the method of reckoning salaries at issue in that judgment was found to be "wrong". The method adopted by the Council in December 1988 was only modified when the new method came into force, viz. on 1 July 1996. To ascertain whether the 1988 method had been correctly applied up to that date, and therefore whether the adjustment he had received corresponded to what was due to him, the complainant should have been provided with updated salary scales and pay slips. He contends that the EPO should have produced these scales, since in 1995 the former President of the Office said he would undertake to correct the salary scales retroactively and apply them to each staff member if the Tribunal found in the complainants' favour in the case which was to lead to Judgment 1663. Furthermore, the execution of that judgment should have led to the establishment of salary scales corresponding to the adjusted pay received by the complainant and "real" pay slips, meaning pay slips "based on remuneration which corresponded to a basic salary scale". However, the EPO only provided "theoretical" pay slips, without indicating whether they corresponded to "real" pay slips.

The complainant recalls that, as of 1 July 1996, the complainants and interveners in the case which led to Judgment 1663 suffered a decrease in their nominal pay due to the fact that they had not signed the individual declaration entitling them to a lump-sum payment. Those staff members who signed the declaration have seen their pay rise. There was therefore discrimination between staff members of the Office.

The complainant requests the Tribunal to order:

(1) the EPO to establish all the "real" pay slips updated in the light of Judgment 1663 for the period from July 1992 to December 1995, and the basic pay scales updated until the coming into force of the new method of reckoning salaries on 1 July 1996;

(2) the application in his case, up to 1 July 1996, of the method of reckoning salaries decided upon in December 1988; the correction of his salary so that he suffers no loss of pay for the past and in the future, and the payment of interest on the sums due.

He also claims costs.

C. In its reply the EPO contests the receivability of the complaint. It says that the claim for real pay slips lacks cause of action. In practice, being in possession of his former pay slips and the theoretical pay slips, the complainant was able to verify the correctness of the sums that he had received and to observe that the pay slips at issue had lost their theoretical nature.

With regard to the claim for the establishment of updated salary scales, the complainant shows no cause of action since, for the period between July 1992 and December 1995, his theoretical pay slips indicated the amount of his basic pay adjusted in line with Judgment 1663. For the period between 1 January 1996 and 30 June 1996, he had at his disposal basic pay scales and scales of the compensation allowance enabling him to calculate the amount of his basic pay deriving from the execution of Judgment 1663.

The EPO emphasises that the complainant, who was only an intervener in the case *in re* Bousquet (No. 2) and others, cannot make claims in his present complaint, "which gives the impression of being an application for an interpretative ruling", that are "much broader" than those made by the complainants in the above case.

Nor does the claim for the 1988 method to be applied to the complainant up to 1 July 1996 show any cause of action, since the pay received by the complainant from 1 July 1992 to 30 June 1996 was calculated according to the adjustment procedure, as interpreted by the Tribunal in Judgment 1663. Similarly the complainant's claim to the correction of his pay for the same period shows no cause of action. Insofar as the claim bears upon the future, it is irreceivable because the internal remedies have not been exhausted. The same applies to the claim for the payment of interest.

In subsidiary argument the defendant explains that the complainant's pleas are based on the belief that Judgment 1663 led to the invalidation of the scales resulting from the EPO's interpretation of the adjustment method and their replacement by scales calculated in accordance with the Tribunal's interpretation. However, the former scales remained applicable to all the staff members who had accepted them through the individual declaration. If the Tribunal had ordered these scales to be set aside, it would have been ruling beyond the ambit of the case. The EPO executed Judgment 1663 correctly by paying the complainant and interveners in the case "an additional pay adjustment corresponding to the difference between the amounts resulting from the scales established in line with the adjustment procedure, as interpreted by the defendant ... and ... the results obtained by applying the interpretation which the Tribunal ... adopted in its judgment". It is for this reason that the pay slips were qualified as "theoretical".

Since the position adopted by the former President of the Office was merely a political gesture, his successor is not bound to adopt the same attitude.

The decrease in salary suffered by the complainant is not unlawful and all the staff members serving in Germany suffered a "slight decrease" in their overall pay in July 1996. Changes to the procedure for the adjustment of salaries lie within the discretionary authority of the Council. Moreover, there is no rule that pay must perpetually rise.

D. In his rejoinder the complainant contends that the term "theoretical" means that his pay slips lost "all legal or contractual value".

He says that the reference to the fact that he was an intervener in the case *in re* Bousquet (No. 2) and others is irrelevant. The nub of the issue is whether the EPO granted all the relief required under Judgment 1663.

His "theoretical" pay slips mentioned a "basic salary", but it was not derived from a basic salary scale, such as Article 66(1) of the Service Regulations refers to. In the absence of such scales, he says he cannot know whether the salary shown was correct.

He did not insinuate that the Tribunal implicitly set aside the scales which were challenged in the case leading to Judgment 1663.

If the commitments entered into by the President are not honoured, the trust in which he is held by the staff of the Office may be jeopardised.

The complainant asserts that it is not relevant to speak of a compensation allowance for the complainants and interveners in the case which led to Judgment 1663. In practice, the latter suffered a loss of pay which was in breach of the principle that nominal pay must be safeguarded.

E. In its surrejoinder the EPO asserts that the complainant has not put forward any arguments in his rejoinder which would make it change its position. It presses its pleas.

It points out that the guarantee of nominal pay is not applicable in the present case, since the scales in force on 30 June 1996 were not higher than those introduced by decision CA/D 20/96 as of 1 July 1996.

It adds that the complainant was "restored to his rights as if the method of reckoning salaries had never been wrongly applied".

CONSIDERATIONS

1. In its Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference may be made and which concerned a dispute relating to salary adjustments, the Tribunal upheld the complaint and invited the EPO to recalculate the adjustments. The advantage obtained therein was also extended to a number of staff members who had intervened in the complaint. However, the great majority of staff members had agreed to a proposed settlement based on a new method of reckoning salaries for the future and the payment by the European Patent Office of a lump sum to all staff who signed the declaration attached to the proposal.

The complainant, who was one of the interveners, was consequently paid an additional sum of 30,414.35 German marks for the period between July 1992 and December 1995. The method of reckoning this sum was indicated to him by the Office. Furthermore, in response to a request by the complainant for pay slips, the Office produced pay slips for him, which were qualified as "theoretical", for each of the months in question. The complainant also requested the establishment of "salary scales" for the above period to serve as a basis for the reckoning of the monthly amounts. The EPO did not consider that it was under any obligation to grant this request, since the complainant had already obtained all the necessary information. Judgment 1663 concerned only a limited number of staff members and did not place the President of the Office under the obligation to establish new salary scales.

On 28 January 1998 the complainant appealed to the President. He requested pay slips updated in line with Judgment 1663 for the period from July 1992 to December 1995 and also asked for updated salary scales for the same period as well as from January to June 1996. Among the reasons which he gave for his request, he noted that, for the period beginning 1 July 1996, the application of a new method of reckoning salaries had resulted in a slight decrease in his monthly pay, while staff members who had agreed to sign the declaration had seen their pay rise. In his view, this constituted an unfair practice and was in breach of the principle of equality of treatment.

The President did not grant the request directly and treated it as an internal appeal. The Appeals Committee recommended that "the appeal be accepted and that a new calculation be made of the complainant's pay for the period beginning 1 July 1996, taking into account the Committee's opinion, as well as the payment of the resulting arrears".

On 14 December 1998, the President dismissed the appeal insofar as it concerned the period 1992-1995 for the reasons set out by the Committee and, for the period beginning 1 January 1996, "for reasons related to the collective appeal RI/84/97" explained in communiqué No. 34 of 26 November 1998.

2. In his complaint, the complainant continues to seek "real" pay slips and updated salary scales. Furthermore, he claims not to have to suffer any loss of pay up to 30 June 1996 or in the future, and to be awarded interest and costs. He complains of a decrease in his pay as of 1 July 1996, while the staff members who had agreed to the settlement by signing the individual declaration have benefited from a pay rise which, he says, is in breach of the right to equality of treatment.

The Organisation contends that the complaint is irreceivable, and subsidiarily is unfounded. It says that it shows no cause of action either with regard to the issuing of pay slips and salary scales or to payment of salary adjustments up to 30 June 1996. With regard to his pay as of 1 July 1996, it argues that the complainant has not exhausted the internal remedies.

3. The complainant requests hearings. But he does not show that they are necessary and the Tribunal sees no need to order them.

4. The complaint gives rise to certain problems of receivability, which will be examined together with the merits.

It is not necessary to determine whether, and if so to what extent, the complaint relates to the execution of Judgment 1663 or consists of a complaint raising separate issues.

5. The claim relating to pay slips shows no cause of action, since the Office provided pay slips. It is devoid of merit insofar as the complainant wants them to be entitled "real" and not "theoretical" pay slips. In practice, their meaning and scope are not open to doubt. The evidence shows that the adjective "theoretical" was used to show that these pay slips were intended to serve as a basis, not for the payment of current salaries, but for the retroactive reckoning of the necessary additional pay. The pay slips contained all the details required to verify their correctness. This claim is unconvincing and therefore fails.

6. So does the claim for the establishment of salary scales, for the valid reasons invoked by the EPO. The complainant received, on an individual basis, all the information allowing him to verify the reckoning of his pay. He has no cause to request the establishment of general scales, which would not have been applicable to the great majority of staff members.

7. The complainant also appears to claim an adjustment of his pay up to 30 June 1996, but without providing details on this point.

The claim shows no cause of action insofar as he has already obtained satisfaction and that all the internal remedies have not been exhausted (Article VII(1) of the Statute of the Tribunal).

8. In practice, the complainant is seeking an increase in his monthly pay from 1 July 1996, as the amount of his monthly basic salary was

10,935 instead of 11,150 German marks. He complains of inequality of treatment and is claiming that the rate of increase granted to staff members who agreed to the settlement should be applied in his case to the augmented pay obtained as a result of Judgment 1663.

The receivability of this claim is debatable. It was undoubtedly not contained in the initial request, although the scope of the claim was extended during its examination by the Appeals Committee, with the latter's consent. Moreover, in the impugned decision, the President dismissed the appeal on the merits without expressing any reservations as to its receivability. In these circumstances, the issue is whether the internal means of resisting it have been exhausted (Article VII(1) of the Statute of the Tribunal) and, without any breach of the principle of good faith, the Organisation is entitled to argue that they have not. However, there is no need to rule on this issue since the claim is in any case devoid of merit.

The complainant rightly does not contest the fact that, as of 1 July 1996, the EPO applied a new method, with new scales, for the reckoning and adjustment of salaries. Nor does he challenge the new method.

Moreover, the complainant does not claim any general right to the maintenance of his level of pay.

He merely invokes a breach of his right to equality of treatment. Consistent precedent has it that an official can complain of the consequences of another staff member being treated more advantageously only if he is in an identical or similar situation to that person.

In the present situation, he is clearly not. The staff members who benefited from the advantages deriving from Judgment 1663 were, for the period at issue in the judgment, manifestly at an advantage in comparison with those who had agreed to the proposed settlement. But the judgment did not confer upon them a right to the proportional maintenance of this advantage in the future on the occasion of subsequent salary adjustments. In these conditions, the concern of the EPO to place staff members on an equal footing, from this point of view, does not give rise to any criticism and the complainant is wrong to infer that he has suffered a breach of his right to equality of treatment.

It should also be recalled that the slight decrease in the complainant's pay in July 1996 did not jeopardise his living standards: on the scope of acquired rights as they relate to pay levels, see Judgments 1642 (*in re* Huber and Treso), under 7(b); and 1618 (*in re* Baillet No. 2 and others), under 21 and 22, and the case law cited.

9. The principal claims fail, and so must the subsidiary ones.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Saunders (No. 19)** **Judgment 1934**

THE ADMINISTRATIVE TRIBUNAL,

Considering the nineteenth complaint filed by Mr Yann Harris Saunders against the International Telecommunication Union (ITU) on 28 December 1998, the ITU's reply of 19 March 1999, the complainant's rejoinder of 13 April and the Union's surrejoinder of 18 June 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Regulation 3.8 a) of the ITU Staff Regulations provides that:

> "A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three months after the date on which the staff member has assumed the duties of the post in the higher grade. However, in the case of a fixed-term post advertised in conformity with the provisions of paragraphs c) and d) of Regulation 4.8, and filled internally, the special post allowance shall be payable as from the date on which the new functions are assumed following appointment made as a result of the competition ..."

Information on the complainant's career is set out under A in Judgments 970, 989, 1018 and 1422.

The complainant was reinstated in the General Services category at grade G.6 with effect from 1 January 1995, even though he continued to discharge the functions of the P.2 post to which he had been promoted, without receiving the corresponding special post allowance.

By a letter of 27 August 1996, the Secretary-General informed the complainant of his decision to abolish his post with effect from 30 November and, therefore, to terminate his appointment on the same date. In a letter of 11 September, the complainant accepted his termination. In a letter of 12 September, the Secretary-General informed him inter alia that this acceptance was conditional on his agreement not to appeal his separation and/or any of its terms and conditions. The termination conditions awarded to the complainant were more favourable than normal. The same day the complainant accepted, in writing, the contents of this letter. In a letter to the Chairman of the Appeal Board, dated 20 September 1996, he indicated that he withdrew unconditionally all of his outstanding appeals against the ITU.

On 29 January 1998, the Tribunal delivered Judgment 1679 (*in re* Serlooten), in which it set aside the Secretary-General's refusal to pay Mr Serlooten (another staff member of the ITU reinstated in the General Services category) the special post allowance provided for under Staff Regulation 3.8 a) and ordered the payment of the allowance as from 1 January 1995.

In a letter of 16 April 1998, the complainant requested the Secretary-General to grant him, in accordance with Judgment 1679, a special post allowance from 1 January 1995 to the date of his separation, that is 30 November 1996. Having received no reply, he lodged an internal appeal with the Appeal Board in a letter of 13 June 1998. He reiterated his request and also asked for recalculation of his termination indemnity. The Board delivered its report to the Secretary-General on 21 September. Considering that on the occasion of his separation, and particularly in his letter of 20 September 1996, the complainant had withdrawn "any future claims" against the ITU, it recommended the Secretary-General not to accede to the complainant's request. In a letter of 8 October 1998, which is the impugned decision, the Secretary-General informed the complainant that he had decided to follow the Board's recommendation.

B. Citing consideration 10 of Judgment 1679, the complainant asserts that Staff Regulation 3.8 a) "applies to anyone who temporarily has to take on the duties of an existing post at a grade higher than his own". He explains that, from 1 January 1995 up to his separation, he discharged the functions of a P.2 post while his personal grade was G.6. He says that he therefore qualifies for the payment of a special post allowance for that period, as provided for in the above Staff Regulation.

Following Judgment 1679, the Secretary-General decided to pay the above allowance to all staff members in the same situation as Mr Serlooten. The complainant contends that the ITU cannot, therefore, refuse him this right.

He submits that the granting of the allowance represents "a minuscule price to pay" by the ITU for its negligence, dilatoriness and unfair treatment of him since 1974. Considering the quality of his services to the ITU, it would be failing in its duty of care towards him if it did not grant him the above allowance as of 1 January 1995.

He emphasises that the losses he suffered in terms of his retirement pension forced him to sell his house in Switzerland and move with his wife to the United States of America.

The complainant requests the Tribunal to quash the Secretary-General's decision of 8 October 1998 and order the payment of a special post allowance from 1 January 1995 to the date of his separation, as well as compensation for the moral and material damages resulting from his forced departure to the United States of America. He also claims costs.

C. In its reply the ITU asserts that, through his long presentation of the facts, the complainant is seeking to induce the Tribunal to re-examine arguments that he had already raised in his previous complaints, which is contrary to the principle of *res judicata*. In practice, the sole issue which arises in the present case is the applicability of Judgment 1679 to the complainant.

The ITU contends that the present complaint is irreceivable in view of the fact that, by appealing, the complainant is in breach of the commitment that he made in his letter of 12 September 1996.

Having left the staff of the ITU in November 1996, and not being a party to the case brought by Mr Serlooten, the complainant is not entitled to benefit from the application of Judgment 1679.

D. In his rejoinder the complainant asserts that he was still in the ITU's service when it should have paid him the special post allowance, but that the ITU "deliberately" postponed paying it. Although he waived any right to contest his separation, he did not waive his rights to the payment of the special post allowance as of 1 January 1995.

E. In its surrejoinder the ITU presses its arguments.

CONSIDERATIONS

1. The nineteenth complaint filed by the complainant, a former staff member of the ITU, challenges a decision of 8 October 1998 by which the Secretary-General decided, in accordance with a unanimous recommendation by the Appeal Board, to dismiss the complainant's request for the payment of a special post allowance at grade P.2 for the period between January 1995 and November 1996, and for the recalculation of the termination indemnity paid to him on the occasion of his separation.

2. In the same way as a number of his colleagues who had been promoted to grade P.2 when they had previously been in the General Services category, the complainant realised that his transfer to the Professional category would have a negative impact on the level of his retirement pension. He therefore opted, as permitted by the ITU, to return to the General Services category as of 1 January 1995, where he was reinstated at grade G.6. His post was subsequently abolished and he was informed, by a letter of 27 August 1996, that his appointment would be terminated on 30 November 1996. He was notified in an annex to this letter of the details of the indemnities to which he was entitled. Following an exchange of letters on 11 and 12 September 1996, as an exceptional measure, more favourable conditions were granted to the complainant, who formally accepted the terms of this settlement and, by a letter of

20 September 1996, withdrew his outstanding appeals before the ITU's Appeal Board.

3. On 29 January 1998, the Tribunal, ruling on the complaint filed by a colleague of the complainant (Judgment 1679, *in re* Serlooten), held that a staff member who had been reinstated in the General Services category, while continuing to perform the same duties as he had at grade P.4, qualified for the special post allowance which, under Staff Regulation 3.8 a) of the ITU, is payable to "any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade". The complainant, who had been refused the payment of this allowance, applied on 16 April 1998 to benefit from the case law resulting from Judgment 1679. His request was rejected in a decision which was confirmed by the Secretary-General of the ITU, in line with the recommendation of the Appeal Board. The Board had unanimously considered that:

> "the negotiations which resulted in 1996 in the arrangement between the ITU and the complainant for the termination of his appointment are of the nature of a final settlement, with the renunciation by the complainant of any future claims on the employer. This means that he can no longer be considered as a member of the group of staff members concerned by the issue of the transition from G to P. The new fact constituted by Judgment 1679 of the Administrative Tribunal delivered ... in respect of one member of this group (Mr Serlooten) does not therefore modify the terms and conditions of the complainant's settlement with the ITU."

4. The complainant is requesting the Tribunal to quash the Secretary-General's decision of 8 October 1998 and order the ITU to pay him the special post allowance to which he considers he is entitled, as well as compensation for the moral and material damages which he claims to have suffered. He reviews the background of his administrative differences with the ITU and the many disputes to which they have given rise, which have nothing to do with the present case. On his entitlement to the special post allowance, he contends that the validity of his claims was recognised in Judgment 1679, which found in favour of a staff member who was in the same situation as he was and which was applied by the ITU to other staff members. He says that the ITU did not discharge its legal obligations towards him and failed in its duty of care to his dignity and reputation. He adds that the ITU imposed a veritable moral sanction on him by taking the

decision, which was imputable to the personal animosity of the Chief of Personnel and the Legal Adviser, to terminate his appointment. If he ended up accepting the conditions imposed upon him by the Administration, it was because he was practically constrained to do so by the circumstances.

5. The ITU rebuts these claims by pointing to the undertaking given by the complainant pursuant to the termination settlement, which it says was exceptionally favourable, not to appeal and to withdraw any outstanding appeals. It adds that Judgment 1679 carries the authority of *res judicata* only on the parties to the dispute, that the complainant had not intervened in the case and that, in any case, he was not in the same situation as the staff members who benefited from the case law, as he had left the ITU's service in November 1996.

6. The complainant's pleas regarding the conditions under which he came to leave his post must fail. He explicitly accepted the settlement proposed to him and did not lodge a precise appeal with the Appeal Board on this point, confining his claims to his alleged entitlement to a special post allowance, for the period between 1 January 1995 and the date of his separation, and a recalculation of his termination indemnity.

7. His claims to the Tribunal on this point must be dismissed. In his letter of 12 September 1996, the complainant unconditionally accepted the Secretary-General's letter of the same day setting out the terms of his separation and making them conditional on his agreement not to appeal the decision to terminate his appointment, nor any of its terms and conditions. Moreover, the complainant, who had lodged three appeals with the Appeal Board, one of which related precisely to his entitlement to the special post allowance, formally withdrew them by his letter of 20 September 1996. There is no evidence that these commitments – which the complainant now appears to regret – were tainted by a fraudulent attitude or pressure from the ITU. The complainant accepted the terms and conditions of the settlement that he made with the organisation, some of which were very favourable, and he cannot challenge them now. His pleas, particularly

relating to the unequal treatment which he claims to have suffered, must also fail in view of the existence of this settlement.

8. The complainant cannot invoke in his favour *res judicata* in a case to which he was neither party nor intervener. Nor did the ITU commit any unlawful act in refusing to accede to his demands and review the reciprocal commitments entered into in September 1996. The complainant's principal claims must therefore fail and, with them, the claims to compensation for moral and material damages, since there is no flaw in the ITU's management of the case.

DECISION

For the above reasons,

The complaint is dismissed.

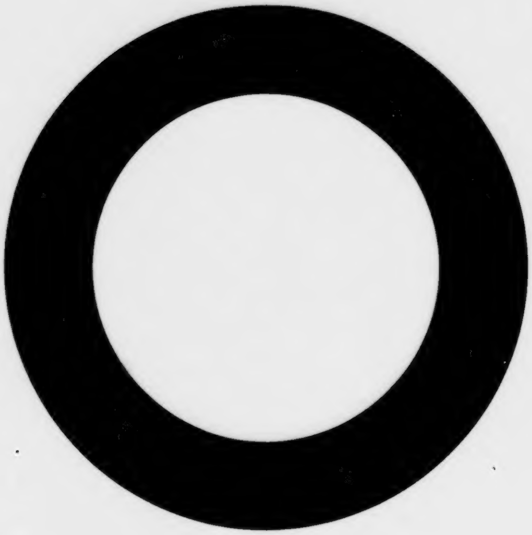
In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET



Registry's translation, the French text alone being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Fabiani (No. 4)** **Judgment 1935**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs Denise Fabiani against the International Telecommunication Union (ITU) on 5 January 1999, the ITU's reply of 16 March, the complainant's rejoinder of 22 April and the Union's surrejoinder of 17 June 1999.

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Regulation 3.8 a) of the ITU Staff Regulations says:

> "A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three months after the date on which the staff member has assumed the duties of the post in the higher grade. However, in the case of a fixed-term post advertised in conformity with the provisions of paragraphs c) and d) of Regulation 4.8, and filled internally, the special post allowance shall be payable as from the date on which the new functions are assumed following appointment made as a result of the competition ..."

The complainant's career and facts relevant to this case are set out under A in Judgment 1678 delivered on 29 January 1998 in which the Tribunal ruled on her third complaint. Judgment 1679 (*in re* Serlooten), delivered on the same day, is also relevant to the present complaint. Both the above cases concerned the terms of the two staff members' reinstatement, on 1 January 1995, in the General Services category and in particular the Secretary-General's refusal to pay them the special post allowance provided for in Regulation 3.8 a).

The Tribunal dismissed Mrs Fabiani's third complaint as time-barred. However it allowed Mr Serlooten's complaint and ordered the ITU to pay him the allowance as from 1 January 1995.

Citing Judgment 1679 the complainant asked the Secretary-General in a letter of 26 February 1998 to grant her the special post allowance as from 1 January 1995. By a letter of 13 March 1998 the Secretary-General informed her that he would grant it as from 1 February 1998, the first day of the month following the delivery of Judgment 1679. In a letter of 3 April the complainant asked him to reconsider that decision and grant the allowance as from 1 January 1995. The Secretary-General refused in a letter of 25 May 1998.

The complainant lodged an appeal by a letter of 4 June. The Appeal Board reported on 24 August. Citing the principle of equal treatment it recommended applying the decision as from 1 January 1995. In a letter of 8 October 1998, the impugned decision, the Secretary-General told the complainant that he had decided not to endorse the recommendation.

B. The complainant contends that the Secretary-General's decision is a breach of Regulation 3.8. Since it establishes no limitations, Regulation 3.8 must be construed as conferring entitlement to the special post allowance as from the date on which the staff member starts to perform the duties of the higher post.

Citing the Appeal Board's report she pleads breach of equal treatment: the ITU has applied Regulation 3.8 differently to two officials who are in the same position in fact.

She asks the Tribunal to quash the Secretary-General's decision of 8 October 1998 refusing to pay her the special post allowance for the period from 1 January 1995 to 31 January 1998 and to order the ITU to pay her the allowance as from 1 January 1995. She claims 4,000 Swiss francs in interest on payments due and moral damages, and an award of 5,000 francs in costs.

C. In its reply the ITU explains that it awarded the complainant a special post allowance only as from 1 February 1998 in order to comply with the limits imposed by the principle that a judgment carries the authority of *res judicata* only for the parties to the dispute.

Had the Tribunal wanted her to benefit from the application of Judgment 1679 it could have joined her third complaint to that of Mr Serlooten and thus averted objection to the receivability of her complaint. To allow her present complaint would amount to devoiding Judgement 1678 of its substance and "impairing" the principles of the certainty and stability of the parties' position in law".

D. In her rejoinder the complainant observes that the ITU confines itself to giving explanations that have no bearing on the complaint.

The ITU's practice having been found unlawful by the Tribunal, it cannot be deemed lawful for the period from 1 January 1995 to 31 January 1998.

The ITU having acknowledged that the case law established in Judgment 1679 applies to other staff members in like situations, its arguments that this judgment carries the authority of *res judicata* only on the parties to the dispute are immaterial.

E. In its surrejoinder the ITU maintains that the arguments put forward in its reply are relevant since they enable the scope of Judgment 1679 to be defined. The ITU is under no obligation to apply that judgment to the complainant in a strictly identical manner.

CONSIDERATIONS

1. The material facts are set out in Judgment 1678, to which the Tribunal refers.

2. In the present complaint, the complainant requests the setting aside of the decision taken by the Secretary-General of the ITU on 8 October 1998, by which he refused her the payment of a special post allowance from 1 January 1995 to 31 January 1998.

She seeks the payment of this allowance from 1 January 1995 under Regulation 3.8 of the Staff Regulations, the granting of 4,000 Swiss francs in interest on payments due and moral damages and 5,000 francs in costs.

3. The ITU contends that allowing the present complaint would amount to: devoiding Judgment 1678 of its content and meaning; "challenging the principles of the certainty and stability of the parties' position in law"; and *de facto* surreptitiously reviewing the above judgment.

The ITU therefore asserts that the complaint is irreceivable on the grounds that it takes up once again a case which has already been resolved and challenges the authority of *res judicata*.

4. In Judgment 1216 (*in re* Saunoi No. 6), the Tribunal indicated that, in order to sustain an objection to *res judicata*, the parties, the purpose of the suit and the cause of action must be the same as in the earlier case.

5. In the present case, the complainant had already lodged a previous complaint with the Tribunal seeking the quashing of the decision by the Secretary-General of the ITU, by which he refused her the payment, from 1 January 1995, of the special post allowance provided for under Regulation 3.8 of the Staff Regulations. This complaint was dismissed in Judgment 1678 and the complainant can no longer challenge the administrative decision to refuse her the above allowance, which has become final.

6. With regard to Judgment 1679, on which she bases her claims, the Tribunal holds that she cannot invoke in support of her pleas the authority of *res judicata* in a judgment to which she was neither party nor intervener.

7. It follows that the complaint must fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Wassef (No. 28)** **Judgment 1936**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-eighth complaint filed by Mr Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 30 December 1996 and corrected on 14 February 1997, the FAO's reply of 10 June 1999 and the complainant's letter of 28 June 1999 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details on the complainant's record of employment at the FAO and the illness which he contracted in Chad in 1993 are set out under A in Judgment 1401 on his first and second complaints. Judgments 1486 and 1702 on his eighth and twenty-sixth complaints are also of some relevance. He was separated from the Organization on 7 January 1994.

In letters of 19 June and 25 July 1995 the Secretary of the Advisory Committee on Compensation Claims informed the complainant that his claim for "partial incapacity for work" had been rejected. The complainant protested against the Advisory Committee's findings in two letters of appeal to the Director-General on 1 and 2 August, and a further two on 15 September. In replies of 29 September and 14 November the Assistant Director-General in charge of Administration and Finance rejected all the complainant's claims on the Director-General's behalf. The complainant therefore put the same claims to the Appeals Committee, filing two appeals on 25 October and two on 22 November 1995: they were given the numbers 476, 477, 480 and 481 respectively.

In the first appeal the complainant requested that the Advisory Committee's report relevant to his case be declared "improper ... and inadequate in quality" and that his "permanent partial incapacity" be recognised. He also wanted his contract extended as from 4 January 1994 and his sick leave approved; reappointment at P.4 level; payment of his entitlements relating to extension and reappointment; per diem for the period he was in Rome; thirty days of special leave with full pay; and a total of 4,006,000 United States dollars in damages and costs. If he should have to file a complaint with the Tribunal he requested reimbursement of the cost of publishing any subsequent judgment in a number of newspapers and a further penalty clause against the FAO in the event of late execution of the judgment.

In the second appeal he alleged "wilful wrongdoing" on the part of the Personnel Division and claimed three million dollars in awards of damages and asked for further payments of interest and costs. He also claimed, if he should have to file a complaint with the Tribunal, the costs of publication of any subsequent judgment in several newspapers and magazines and 50 per cent of the total award for every two weeks of delay in payment following the issuing of the judgment.

In the third appeal he asked mainly for a "compensation annuity for life" with interest payable on the sum owed, and he wanted instructions issued to the Social Security Group to "effect payments of all claimed benefits".

In the fourth he challenged the report of the Advisory Committee rejecting his claim for partial incapacity and asked that the Personnel Division and the Secretary of the Committee be instructed to rule on his incapacity for work. He claimed compensation for "torts and damages", and a further one million dollars if his case should go to the Tribunal.

The Appeals Committee recommended rejecting the appeals. The Director-General endorsed that opinion in four final decisions dated 4 November 1996. The complainant is impugning those decisions.

B. The complainant says that he brought his four appeals against the Director-General's decision of 19 June 1995 and the "wilful misconduct" of the Advisory Committee on Compensation Claims whose recommendations led to that decision. The complainant's main argument is that from the point when his illness was recognised as being service-incurred other rules had to be "brought into play", but instead the Administration "cancelled" all his rights and entitlements. Fundamental facts were overlooked and mistakes of fact and law occurred through the fault of the Personnel Division, Medical Service, Advisory Committee and the FAO Staff Pension Committee.

His sick leave came to an end and he was separated from service with effect from 7 January 1994, after the Medical Service, relying on a certificate from his own doctor, stated that he was fit for work. However, his illness was subsequently recognised as being service-incurred. The Organization had, therefore, terminated his appointment under a false pretext in order to deny him compensation for incapacity under FAO Manual paragraph 342.524. It is clear from the letter of 19 June 1995 that the Advisory Committee based its opinion about his fitness for work as of 7 January 1994 on the erroneous conclusions of the Medical Service. The Committee then refused his claim to be considered partially incapacitated for work. He maintains that the terms of that letter and the decisions stemming from it cannot stand: particularly because the proceedings, which gave rise to the letter, were overruled in Judgment 1486 and three later judgments.

He blames the Administration for not securing "the minimum standards of due process". He asks for the proper determination of his rights and entitlements with regard to recognising his incapacity.

He asks the Tribunal to award him: his "rights and entitlements for unconditional total permanent incapacity as a result of the complex of chronic infirmities due to [his] service-incurred illness"; his other claims are those listed under A above relative to his four internal appeals, including awards for damages with interest added. He also claims costs.

In his summary of the main claims in his four appeals he asks for "a proper award for the torts committed by the Administration and the Advisory Committee" and "a proper award for the psycho-physical, financial, moral and social damages".

C. In its reply the Organization points out that the facts and supporting arguments presented by the complainant considerably overlap with those put forward in earlier complaints. If, as the complainant says, the letter of 19 June 1995 cannot stand because the proceedings which led to its terms have already been overruled by the Tribunal then the issues covered in the letter must be *res judicata*. The complainant's claim to an award for the "torts committed by the Administration and the Advisory Committee" and his claim to a "proper award for the psycho-physical, financial, moral and social damages" are new claims, though linked to earlier ones. They are either time-barred or *res judicata* and therefore irreceivable.

The complainant has provided no evidence of any wrongdoing on the part of the Organization, neither has he shown that the Organization has caused the "total permanent incapacity" he refers to. The complainant's case was dealt with according to the relevant provisions of the Manual.

The FAO argues that the complainant's claim to "unconditional total permanent incapacity" overlaps with his claim to a disability benefit. When the FAO Staff Pension Committee rejected such a claim the complainant appealed to the Standing Committee of the United Nations Joint Staff Pension Board which rejected his claim at a meeting it held on 17 July 1996. Therefore, under the rules of the Pension Fund, any further remedy would have to be sought from the United Nations Administrative Tribunal which alone has jurisdiction to deal with such cases.

CONSIDERATIONS

1. As in the twenty-seven complaints previously examined by the Tribunal at the petition of this former FAO official, the present complaint concerns the consequences of the disease contracted by the complainant when he was serving in Chad on behalf of the FAO on a project financed by the United Nations Development Programme. The complainant finally succeeded in getting the FAO to give him the "benefit of the doubt" and recognise that his illness should be regarded as being service-incurred, in accordance with the Tribunal's ruling in its judgment of 1 February 1996 (Judgment 1486, *in re* Wassef No. 8). The medical expenses which he incurred were reimbursed to him and he was placed on sick leave with full pay beyond the normal expiry date of his contract and until he was recognised medically fit for work.

These decisions did not satisfy the complainant who, since then, has filed numerous appeals with FAO bodies with a view to obtaining compensation for the damages which he says he suffered and the recognition of his right to a disability benefit. In the present complaint, he is challenging four decisions by the Director-General of the Organization of 4 November 1996 dismissing four appeals which he had filed.

2. The complainant requests the joinder of his various claims, and the defendant agrees. However, as he has filed a single complaint, there is no need to rule on any joinder. The content of the four decisions which he is challenging must nevertheless be examined one after the other.

3. The first decision which is being impugned corresponds to case No. 476 examined by the Appeals Committee. In accordance with the Committee's recommendation, this decision dismissed an internal appeal filed by the complainant against a decision of 29 September 1995 to reject an appeal of 1 August 1995. In this latter appeal, he sought: the reconsideration of the report of the Advisory Committee on Compensation Claims, with which he was not satisfied; the recognition of his permanent partial incapacity; the extension of his contract until the settlement of his claim; his reappointment at grade P.4 with all resulting entitlements; the

payment of a *per diem* for his stay in Rome; the granting of thirty days special leave with full pay; as well as various indemnities and the reimbursement of costs. While agreeing that the Organization could have handled the matter more assiduously, the Appeals Committee considered that the claims made in the appeal were totally unfounded, that there was no medical evidence of the complainant's incapacity and that there was no justification for the extension of his contract, which had lawfully come to an end and which had in any case already been the subject of an appeal that had been rejected by the Administration. The Director-General, in the first impugned decision of 4 November 1996, endorsed the Appeals Committee's recommendation in case No. 476.

4. The second impugned decision corresponds to case No. 477 examined by the Appeals Committee, in which it rejected an appeal filed against another decision of 29 September 1995 dismissing an appeal of 2 August 1995. In this latter appeal the complainant took the Administration to task in strong terms for its gross wilful misconduct in dealing with his case. Once again, on the basis of claims which were rejected as being totally unfounded, he claimed considerable sums in compensation for the prejudice suffered.

5. The third decision concerns a case registered under the number 480 by the Appeals Committee. By this decision, the Director-General refused to accede to the claims of the complainant who, on 15 September 1995, had requested that he be granted an annuity for life equivalent to 67 per cent of his last pensionable remuneration as of 7 December 1993, plus interest at 25 per cent per annum, and that instructions be given to the Social Security Group to pay all the benefits which he had claimed on 9 August 1995. These claims were also found to be devoid of merit by both the Appeals Committee and the Director-General of the FAO.

6. By the fourth impugned decision, the Director-General rejected a case filed under the number 481 appealing against a decision of 14 November 1995, which rejected claims made on 15 September 1995 relating to the recognition of his partial incapacity. The complainant

challenged the conditions under which his claims had been examined, sought compensation for the injuries suffered and requested that instructions be given to the Advisory Committee on Compensation Claims to rule as rapidly as possible on the recognition of his incapacity for work. All these claims were also rejected.

7. To challenge the validity of the decisions which he is impugning, the complainant comes back to issues which have already been examined by the Tribunal, particularly in relation to the application for execution of Judgment 1486, in which it was recognised that the illness contracted in Chad was assumed to have been due to his professional activity. As the Tribunal ruled in Judgment 1702, of 29 January 1998, the claims relating to the alleged failure of the FAO to execute the judgment are irreceivable. The complainant's pleas on this point concern issues which are *res judicata*. The complainant's arguments challenging the date on which his appointment was terminated and those concerning his difficulties in obtaining legal assistance in the absence of a panel of counsel also relate to matters which have already been resolved by the Tribunal. The claims which once again seek the Organization's condemnation for its negligence towards him have been made on several occasions and, even though certain failings can indeed be noted in the handling of the case, they are not attributable to any clearly improper ill will on the part of the Organization.

8. For the rest, the FAO emphasises in its reply that the issue of whether the complainant should have been considered definitively unfit for work as a result of his service with the FAO was examined carefully by the Advisory Committee on Compensation Claims and the Appeals Committee and that he has provided no proof challenging the medical findings made at that time. In his complaint the complainant confines himself to asserting that the certificate issued by his own doctor, which was interpreted as finding him medically fit for work as of 4 January 1994, did not have the meaning and significance attributed to it by the FAO. The complainant did not submit a rejoinder and has, therefore, produced no evidence challenging the defendant's argument.

9. Finally, the Tribunal observes that, if the complainant intends to pursue his claims for a disability benefit from the United Nations Joint Staff Pension Fund, he must appeal to the United Nations Administrative Tribunal against the decisions taken in this respect by the Standing Committee of the Board of the Fund, which rejected his claim on 17 July 1996.

10. The complainant's claims are therefore either devoid of merit, or irreceivable because they concern issues that are *res judicata*, or too vague to be taken into consideration or not within the jurisdiction of the Tribunal. They must, therefore, fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Wassef (No. 29)** **Judgment 1937**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-ninth complaint filed by Mr Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 30 December 1996 and corrected on 14 February 1997, the FAO's reply of 5 July 1999 and the complainant's waiver of his right to rejoin;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details on the complainant's employment at the FAO and on the illness which he contracted in Chad in 1993 appear under A in Judgments 1401 on his first and second complaints. Judgments 1486 and 1702 on his eighth and twenty-sixth complaints are also of some relevance. He was separated from the Organization in January 1994.

Prior to going to Chad in 1991 the complainant was informed about the Group Life, Accident and Disability Insurance (GLADI), a voluntary plan where the cost of participation is borne entirely by the person insured. He filled in the relevant application form on 26 June 1991.

On 9 August 1995 he applied for payment of permanent disability benefits under GLADI and asked to see a copy of the original contract with the insurer.

By a letter dated 18 August 1995, the Senior Personnel Officer in charge of Social Security informed the complainant that section 346 of the FAO Manual constituted the current contract between the Organization and the insurer and that the question of the benefits he was entitled to was settled in the letter he had previously written to him on 19 June 1995 in his capacity as Secretary of the Advisory Committee on Compensation Claims. That letter had made clear which benefits would be granted to him under Manual section 342 relating to the FAO Staff Compensation Plan. It had also informed him of the Director-General's decision to accept the recommendations of the Committee and said that if he wished to appeal against that decision he could do so within ninety days of receiving it.

The complainant filed two appeals with the Director-General on 23 October and 5 December 1995, against the rejection of his claim for disability benefits and the way his claim was handled. He sought damages in both appeals. The Assistant Director-General in charge of Administration and Finance replied to his first appeal on behalf of the Director-General on 21 December 1995 rejecting his claims on the grounds that with the type of cover he had taken out under the GLADI scheme he had no entitlement to a "disability annuity" or to exemption from payment of insurance premiums against "death from any cause". Such benefits were available only to those specifically covered, whereas he had taken out insurance only against "accidental death and dismemberment". In a letter of 12 January 1996 he rejected the complainant's second letter of appeal as it concerned the same subject matter as his first.

Meanwhile the complainant had lodged an appeal with the Appeals Committee on 2 January, followed by a second on 22 January 1996. In his first appeal he asked for one million United States dollars in "general and punitive" damages for Personnel's "wrongdoing"; an annuity for life equal to 20 per cent of his last pensionable remuneration; exemption from further payment of the premium for "death from any cause" until age 65; compound interest of 25 per cent per annum on all the sums due to him from September 1993. If he should have to file a complaint before the Tribunal he also requested reimbursement of the cost of publication of any subsequent judgment in a number of newspapers and a penalty clause against the FAO in the event of delay of execution of the judgment.

In his second appeal he sought payment of one million dollars in "general" damages and one million in "punitive" damages; and compound interest of 25 per cent per annum on those sums from 3 February 1996, the date when the Organization's reply was due. He also requested reimbursement of the cost of publication of any subsequent judgment in a number of newspapers and a penalty clause against the FAO in the event of delay of execution of the judgment, should he have to file a complaint with the Tribunal.

The Director-General rejected both appeals in two final decisions dated 4 November 1996, which the complainant now impugns.

B. The complainant explains that the pleas relevant to this case were submitted in the rejoinder to his twenty-sixth case, which was an application for execution of Judgment 1486. As he has now obtained a negative final decision he has filed this complaint in case the Tribunal has meanwhile found his claims irreceivable in the context of his earlier one.

In view of the monthly premium he paid, the complainant considers that cover was not limited to "accidental death" only. On the application form filled out on 26 June 1991, he applied for cover for "accidental death and dismemberment" and for "permanent disability". On 1 July the form was returned to him with no cancellation of "permanent disability" and the Social Security Group did not deny that he had such cover when he first claimed an annuity; the denial came from the Director-General in response to his appeals.

The Social Security Group offered him reimbursement of an amount equivalent to the exact amount of his premiums during the thirty months he was paying for disability benefits although Manual section 346 makes no provision for such a refund. Even if the Personnel Division considered that he was given disability cover by mistake, he was never offered the chance to convert his insurance from "accidental death" to "death from any cause".

He submits that the Organization did not observe the rules on "form and procedure". It obstructed his attempts to obtain his rights and he holds it fully responsible for the denial of his entitlements. He therefore asks the Tribunal to award him what he claimed in his two internal appeals, including damages and interest on all the amounts due at 24.25 per cent. He also claims costs.

C. In its reply the Organization considers that all the issues raised in his complaint overlap with issues in previous complaints and are *res judicata*.

As to whether or not the complainant had cover under GLADI for permanent disability, it explains first that from the application form it was clear that he had selected cover for "accidental death and dismemberment" and "permanent disability". However, the latter option was only possible with cover for "death from any cause and exemption from premium payment" which the complainant had not requested. On 4 July 1991 he was told he could not be covered for "permanent disability" without having the other cover. He was also given a "notification of personnel action" dated 2 July 1991 which showed that he did not have such cover.

Paragraph 14 of administrative circular 91/3, which was sent to staff at headquarters and in the field, stated:

> "Cover against disability is also optional but participants may subscribe to it only if they are covered for death from any cause and exemption of premium payment."

Secondly, the Organization says that even if the complainant had asked for cover against permanent disability he did not meet the requirements of permanent incapacity at the date of separation to qualify for an annuity. Under Manual paragraph 346.5542

> "Total permanent disability shall be deemed to exist if the participant has been found by the competent organ of the United Nations Joint Staff Pension Fund to be totally and permanently incapacitated."

On 14 September 1995 the complainant applied for disability benefits under the rules of the Pension Fund, but his claim was rejected. Any further remedies would have to be pursued according to those rules and the United Nations Administrative Tribunal alone has jurisdiction in the matter.

Thirdly, the Organization asserts that it did no wrong, and the complainant's claim for damages is too vaguely expressed to "facilitate a reasoned response".

CONSIDERATIONS

1. In his twenty-ninth complaint, the complainant, whose illness contracted in Chad was previously recognised as being service-incurred but was not regarded as having caused permanent incapacity for work, is challenging two decisions by the Director-General of the FAO of 4 November 1996. In these decisions, in accordance with the recommendations of the Appeals Committee of 28 June 1996, the Director-General rejected his claims for permanent disability benefit under the Group Life, Accident and Disability Insurance Plan, known as GLADI. He submits that he should have been insured under GLADI against the contingency of permanent disability and that, if he was not covered against this contingency, the Organization was responsible for the oversight. As in the other complaints which he has filed with the Tribunal, he seeks large sums in compensation from the FAO.

2. On 26 June 1991, the complainant requested enrolment in the voluntary insurance scheme which the Organization had recently decided to establish. The application form completed and signed by him indicated that he was applying for cover against "accidental death and dismemberment" and permanent disability. However, he did not request cover against "death from any cause". This form was signed, and therefore approved, by a representative of the Organization on 1 July 1991. However, the applicable rules, set out in circular 91/3 of 14 January 1991, provided that cover against disability could only be subscribed to by insured persons who were covered against the contingency of death from any cause. Having rapidly realised the error made by the competent services, the Administration sent him a note on 4 July 1991 explaining the existence of this rule. The complainant says that he does not remember having received such a note and expresses surprise that such a communication was not sent by more appropriate means, particularly since he had just left for Chad. He complains that his insurance contract was

never communicated to him and that, not even knowing the company with which he was insured, he was not able to pursue his claims directly with the insurance company. He also emphasises that, in its statement to the Appeals Committee, the Organization bases its argument denying him any entitlement on the fact that he had recognised in the application form that he had read Manual section 346, which was clear on the disputed point. But the FAO admitted that the new rules of the GLADI plan had not yet been incorporated into the Manual. Finally, he takes the Organization to task for the many shortcomings and delays which, he says, characterised its handling of the case.

3. The FAO rebuts this plea and asserts that the complainant had been fully informed that he was not insured against the contingency of disability and that, in any case, even if he had been so insured, he did not meet the requirements for entitlement to a disability benefit. Indeed, on 23 November 1995, the FAO Staff Pension Committee rejected the complainant's application for a disability benefit from the United Nations Joint Staff Pension Fund on the grounds that his incapacity had not been recognised. The Standing Committee of the Board of the Fund rejected his appeal on 17 July 1996.

4. It is this latter argument which the Tribunal finds decisive. The FAO's handling of the case was certainly far from perfect and the Organization itself admitted to the Appeals Committee that the approval by one of its officials of an incorrect application form on 1 July 1991 was the result of an oversight. The error was admittedly put right rapidly, although it is not proven that the complainant actually received the note of 4 July. Furthermore, the pay slips which should have indicated the precise purpose of the contributions that he was paying for the GLADI were lacking in clarity and detail. It cannot, therefore, be excluded that he was badly informed of the real nature of his rights, particularly since Manual section 346 had not yet been amended when he accepted his cover by GLADI, and the Organization appears not to have given him any means of ascertaining the nature of the contract under which he was insured. As the Appeals Committee observed, "the rules regarding GLADI could have been communicated to the appellant in a more appropriate way".

Nevertheless, the errors which were committed could only have prejudiced the complainant if they had had the effect of denying him a right. In this respect, it is clear that the absence of any recognition of medical incapacity at the time his appointment came to an end denies him any right to a disability benefit. Manual paragraphs 346.5541 and 346.5542 provide that:

> "346.5541 Upon separation, an annuity ... shall be payable ... to participants ... if they are found to be permanently incapacitated for further service ...
>
> 346.5542 Total permanent disability shall be deemed to exist if the participant has been found by the competent organ of the United Nations Joint Staff Pension Fund (UNJSPF) to be totally and permanently incapacitated for further service with a member organization of the Fund ..."

As indicated above, and it is not challenged by the complainant, who did not enter a rejoinder, the Standing Committee of the Board of the Fund rejected his appeal against the decision not to recognise his incapacity. Any challenge to this decision does not lie within the jurisdiction of the Tribunal.

5. In these conditions, the administrative errors committed by the FAO did not cause the complainant any prejudice. His claims to an annuity for life and various types of compensation must, therefore, fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Alvarez Vigil** **Judgment 1938**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Julio Alvarez Vigil against the Pan American Health Organization (PAHO) on 13 October 1998 and corrected on 23 October 1998, the PAHO's reply of 3 February 1999, the complainant's rejoinder of 13 April and the Organization's surrejoinder of 26 July 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, of Chilean nationality born in 1932, worked for the PAHO for twenty years, from June 1976 to October 1996, under (1) a fixed-term appointment as a staff member (2) short-term consultancy contracts (3) temporary advisor contracts and (4) "contractual service agreements" as an independent contractor.

He joined the PAHO in Guatemala City on 3 June 1976 as a staff member under a two-year appointment. His family joined him in January 1977 but returned to Chile shortly thereafter when it appeared that the appropriate school was not available for his children. In March 1978 the complainant was informed that his contract would be renewed for only one year, due to lack of funds. In a letter of 22 March 1979 the Chief of Personnel informed the complainant of the terminal entitlements that he would be due upon his separation effective 3 June 1979. In November 1979 he was paid his repatriation grant and accrued annual leave.

At the end of his fixed-term appointment he remained in Guatemala to carry out different tasks for the PAHO under a short-term consultancy contract. Similar contracts followed, covering the complainant's collaboration with the PAHO from June 1979 to June 1988 and then again from June to September 1991.

On 27 May 1981 he received a letter from the Chief of the Consultant Staffing Unit informing him that, since he had not returned to Chile during the previous two years, Guatemala would now be his "normal place of residence" and in the future he would not be entitled to a daily subsistence allowance (per diem). In August 1981 the complainant replied saying that he had not taken any legal action to change his place of residence from Chile to Guatemala and he requested that the situation be reviewed. In a letter dated 13 October 1981 the Chief of the Consultant Staffing Unit reaffirmed her decision.

Between July 1982 and October 1988, the complainant received four short assignments as a temporary advisor to the PAHO. The longest of these assignments was for one month.

Between 1988 and 1996 the complainant worked for the PAHO under several "contractual service agreements". During the late 1980s he began working at PAHO headquarters in Washington, D.C. His last appointment ended on 31 October 1996.

On 22 July 1996 he wrote to the Director of the PAHO requesting that the PAHO pay the expenses for shipping his personal effects from Washington to Chile. In a letter dated 25 September the Chief of Personnel denied his request. The complainant then sent her a memorandum petitioning for various benefits that he believed were due to him. Interpreting the lack of reply as a denial, the complainant submitted his appeal to the headquarters Board of Inquiry and Appeal on 22 November 1996.

By a letter dated 16 July 1998, the Director of the PAHO informed the complainant that since the Board found him to be an independent contractor and not a staff member when he filed his appeal, the appeal was not receivable. Nevertheless, the Director informed the complainant that he could submit his complaint to the Administrative Tribunal of the International Labour Organization. This is the impugned decision.

B. The complainant makes two pleas. First, he contends that for much of his service with the PAHO he was a *de facto* staff member and, therefore, entitled to the benefits accorded to staff members. He argues that after his fixed-term contract with the office in Guatemala ended, he continued to perform the functions of a staff member under many of his contracts. He cites Judgment 701 (*in re* Bustos) in which the Tribunal found that "the work done for the PAHO ... was a continuous whole and that its division into contractual periods as a short-term consultant was fictitious" and argues that his own service should be viewed in the same manner. He places particular emphasis on the four years he worked as the coordinator of a programme on cholera prevention and control in Washington, which he maintains was without interruption. The complainant contends that his duties included inter alia hiring personnel and dealing with budget allocations, and that those duties went beyond those of a mere contractual employee. He alleges that the intention of the PAHO, in creating numerous short-term contracts over a 17-year period, was to deprive him of "the benefits of a regular staff member".

Secondly, the PAHO denied him his full benefits as a short-term consultant when it changed his place of residence from Chile to Guatemala. The complainant argues that the PAHO's decision to deprive him of a per diem while he worked in Guatemala was in breach of the Tribunal's case law and violated Staff Rule 460 on the procedure for determining an official's place of residence. He maintains that he took no legal action to change his place of permanent residence to Guatemala and refers to a certificate dated 6 June 1983 issued by the Chilean Consulate in Guatemala certifying that Santiago, Chile, was his normal place of residence.

He seeks compensation for the benefits he would have received as a regular staff member, such as: repatriation grant, contributions to his pension fund, vacation leave, meritorious within-grade step increases, health insurance, transportation of personal effects, travel expenses for himself and his dependants, education grant for his son, and other benefits due to staff members. He also claims moral damages and costs.

C. In its reply the PAHO contends that the complainant has received all benefits due to him under each contract.

The PAHO claims that the complainant was accorded in 1979, all benefits he was entitled to under his fixed-term contract, and that his claim to repatriation grant and transportation of his personal effects is unwarranted. The complainant cancelled his travel plans in order to remain in Guatemala to accept a short-term consultant contract and subsequently forfeited this right when he did not request a deferral to travel on a later date. In addition, his family did not qualify for repatriation travel since they did not stay in Guatemala for the requisite six months.

The Organization argues that the claims regarding per diem are both time-barred and devoid of merit. A final decision was taken by way of the letter of 13 October 1981. As the complainant did not appeal against this decision within the sixty-day time limit required by Staff Rule 1230.7.3, his claims are now time-barred. It also points out that the rationale behind the payment of a travel per diem, provided for in Staff Rule 830, is to cover incidental expenses arising under travel status, inter alia charges for meals, lodging, fees and gratuities. At the time in question, the complainant was residing in Guatemala City with his family and not accruing incidental travel expenses.

When the complainant worked as an independent contractor with the PAHO he was not a staff member and therefore – under the terms of the Contractual Service Agreements that he signed – arbitration, and not the Tribunal, is the proper forum for settling disputes. The complainant was aware that the language of his contract precluded any finding that he was an employee of the PAHO; he was also aware of the difference between his own contract and that of a regular staff member. On more than one occasion he had unsuccessfully attempted to secure a staff position, indicating on his application that he wished "to obtain a permanent post" with the Organization.

D. In his rejoinder the complainant contends that the PAHO has failed to prove it has accorded him all benefits due to him. He is "not asking the Tribunal to rewrite the contracts" but requests compensation for the wrongdoing of the Organization in depriving him of his entitlements. He acknowledges that he did not return to Chile at the end of his fixed-term contract, but contends that it would have resulted in a loss of opportunity to continue with the PAHO. He offers his passport visas for Guatemala as further proof that Chile continued to be his country of residence and his visas for the United States as proof of his relationship as a staff member of the PAHO.

Responding to the issue of arbitration raised in the PAHO's reply, he maintains that the PAHO had numerous opportunities to raise this issue, that it should have been raised during his internal appeals, and that by raising it now the PAHO is trying to "obstruct and delay the resolution of the issues". He contends that the ILO Administrative Tribunal is the proper forum because he raises issues regarding his contract and his pension fund, both areas falling within the competence of the Tribunal.

E. In its surrejoinder the PAHO rebuts all the complainant's arguments as being devoid of merit and reaffirms that he received all benefits to which he was entitled.

The complainant had ample time to investigate schools in Guatemala and determine whether his children's needs would be met. The PAHO was under no obligation to investigate the quality of education for his children. Furthermore, he forfeited his own right to repatriation travel when he cancelled his ticket to Chile and did not request an extension of this right.

The PAHO rebuts all the arguments that the complainant was a *de facto* staff member. Refuting the complainant's claims that his visa for the United States was facilitated by the PAHO, it states that his visa was not sponsored by the PAHO and that he held a generic tourist visa.

It also maintains that it was under no obligation to call the complainant's attention to the arbitration clause in his contract.

CONSIDERATIONS

1. The complainant, who is of Chilean nationality, was engaged by the Pan American Health Organization (PAHO) on 3 June 1976 to serve in Guatemala under a two-year appointment, which was extended for one year in 1978. Although this fixed-term appointment ended on 3 June 1979, the complainant then worked almost continually for the PAHO in Guatemala or at its headquarters in Washington, D.C., no longer as a regular staff member, but as a short-term consultant, temporary advisor or an independent contractor. In this latter capacity, he concluded several contractual service agreements with the Organization, and when the last of these came to an end on 31 October 1996, he was responsible for coordinating in Washington a programme on cholera prevention and control for the region covered by the PAHO.

2. Shortly before the expiry of his last contract, the complainant wrote on 22 July 1996 to the Director of the PAHO requesting him to give the necessary instructions to pay the cost of shipment of personal effects from Washington to Chile. The Chief of Personnel of the PAHO replied to this letter on 25 September 1996 that, since the complainant had personally decided to live in Washington and had not been a regular member of the staff since 1979, it was impossible to accede to his request. As soon as he had received this refusal, the complainant once again wrote to the Chief of Personnel recalling that he had served the PAHO for twenty years and requesting payment of benefits which had been denied him over that long period and which he considered to be due to him. He claimed a repatriation grant, annual leave, health insurance, merit steps for years of service and a better pension. As the Administration did not reply to this request, he appealed in November 1996. On 19 June 1998, the headquarters Board of Inquiry and Appeal found that the appeal was not receivable as the complainant was not a staff member at the time that he had filed it. The Board nevertheless drew the attention of the Director of the PAHO to the fact that the complainant had been able to feel that he was a staff member in view of the full-time responsibilities entrusted to him and that in the future the PAHO should apply more strictly the clauses of the Conditions for Use of Contractual Service Agreements. By

a decision of 16 July 1998, which is the impugned decision, the Director of the PAHO decided to accept the Board's conclusion that the appeal was not receivable since it had been filed by a contractor who was no longer a staff member of the Organization.

3. In reviewing the Tribunal's competence with regard to the various claims made by the complainant, who in his submissions claims benefits which have not been paid to him over the past twenty years, a distinction must be made between two categories of claims. In the first place, there are those concerning the indemnities which he says were due to him upon the expiry of his last contract as an independent contractor, which was governed by the Conditions for Use of Contractual Service Agreements, and particularly his claims for shipment and repatriation expenses. In the second place, there are the indemnities which he says should have been paid to him throughout his career as a regular staff member, short-term consultant or temporary advisor.

4. As an independent contractor the complainant concluded contractual service agreements which explicitly provided that any dispute arising in their interpretation or execution would be subject to conciliation or, if that should fail, would be settled by arbitration and that the parties would accept the arbitral award as final. This clause, which was agreed to by the complainant, has the effect of removing disputes concerning the application of the above agreements from the jurisdiction of the Tribunal, as indicated by the PAHO, which rightly cites Judgments 75 (*in re* Privitera) and 77 (*in re* Rebeck). The fact that the PAHO did not itself invoke this arbitration clause during the internal appeals procedure does not prejudice the fact that the two parties freely accepted recourse to arbitration to settle disputes arising out of the application of contractual service agreements, thereby perforce excluding them from the Tribunal's jurisdiction. The fact that, as emphasised by the complainant and noted by the Board of Inquiry and Appeal, the functions discharged by the complainant were in reality of a permanent nature, which should normally have been entrusted to regular staff members, cannot invalidate an arbitration clause explicitly subscribed to by the parties. The complainant cites in support of his argument Judgment 701 (*in re* Bustos), in which the

Tribunal recognised its competence to examine an issue raised by a complainant who was bound to the PAHO by regularly renewed consultancy contracts, but who was not a regular staff member of the Organization. However, the similarities with the case at issue are only apparent. In the Bustos case, the complainant had concluded short-term contracts which did not contain any arbitration clause. In the present case, the complainant was bound to the Organization for the last years of his activity by contractual service agreements which included the arbitration clause examined above. The Tribunal therefore finds that the claims respecting the various indemnities, in particular the repatriation grant and shipping expenses from Washington to Santiago de Chile following the expiry of the complainant's last contract, do not lie within its jurisdiction.

5. There remain certain claims which do merit examination. These are set out, admittedly in an extremely general manner, in the letter sent on 25 September 1996 to the Chief of Personnel. They relate to a period during which the complainant was either a staff member, or was bound by contracts of employment which give grounds for considering that his relationship with the Organization had become permanent, within the meaning of the case law established in Judgment 701 cited above. Moreover, these contracts did not envisage recourse to arbitration in the event of any dispute as to their interpretation or execution. The Tribunal further notes that the PAHO does not raise any objections to these claims in relation to the jurisdiction of the Tribunal, even though it deems them irreceivable or devoid of merit.

6. The complainant appears to be challenging the indemnities which he received at the end of the period when he was a regular staff member of the Organization. It is very surprising that these claims should be made over fifteen years after the expiry of his fixed-term appointment on 3 June 1979. Moreover, irrespective of the delay in challenging these measures, the PAHO provides proof that the complainant received all the entitlements which he could claim at that time. He was paid a repatriation grant of 4,798.62 United States dollars. If he did not receive an air ticket, travel expenses or shipping expenses of his personal effects from Guatemala to Chile, it was because he had decided to remain in

Guatemala. He was also paid 4,051.68 dollars in accrued annual leave and does not produce any evidence of prejudice in his entitlements to promotion, pension, accident and health insurance, sick leave or education grant during the period in question.

7. With regard to the entitlements which the complainant says he was denied during the period when he was covered by short-term consultancy contracts, he complains principally that he was not granted a daily subsistence allowance (per diem) when he was posted to Guatemala City, even though he was a Chilean citizen and, according to a certificate issued by the Chilean Consulate in Guatemala, his permanent residence was in Santiago de Chile. But the PAHO shows that the issue was settled in 1981, when he was informed in a letter of 27 May 1981 that his normal place of residence would be considered to be Guatemala City and not Santiago de Chile, which he had not visited since 1979, and that PAHO Manual paragraph II.12.320 only permitted the payment of the allowance in question for periods of service outside the normal place of residence. The complainant did not at that time lodge an appeal against the Organization's position, which was entirely lawful, and he provides no evidence that he was denied any allowance or benefits to which he would have been entitled under his consultancy contracts.

8. With regard to the very short periods during which he worked for the Organization under temporary advisor contracts, namely from 25 to 30 July 1982, 7 September to 4 October 1987, 12 to 22 June 1988 and 3 to 7 October 1988, the complainant provides no information which would allow him, several years after the material facts, to challenge the benefits which he received. In practice he is seeking to obtain a revision of the whole of his career from 1976 to 1996. But he himself accepted the contractual conditions offered to him. He did not challenge the decision taken in 1979 not to renew his fixed-term appointment and not to convert it into a permanent appointment. Moreover, he offers no legally valid argument to challenge the way he has been treated since 1979. His claims must therefore be dismissed, either as being devoid of merit or, for those relating to the contracts envisaging recourse to conciliation and arbitration, as not being within the Tribunal's jurisdiction.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

In re Almazán-Aguirre (No. 3), Carrillo (No. 3) and Rubiano-Lisiewski

Judgment 1939

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaints filed by Mrs Miriam Magaly Almazán-Aguirre and Miss Maria Teresa Carrillo, and the complaint filed by Mrs Clara Rubiano-Lisiewski against the Pan American Health Organization (PAHO) on 11 October 1998 and corrected on 25 November 1998, the PAHO's reply of 17 March 1999, the complainants' rejoinder of 3 May and the Organization's surrejoinder of 10 August 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering the applications to intervene filed by:

M. Araujo
L. Beckner
L. Callaghan
I. C. Arp Campero
E. Chambers
C. M. Chand
J. M. Claudio
C. De la Barra
M. De Orio
A. T. Ellauri
G. Ettori
M. E. Fárjam
A. G. Freeman
L. Fuller
O. M. Glorioso
G. Gómez de la Torre
N. Hernández
O. Herrada
A. Huaman-Schmahmann
R. Leiva

M. M. Linares
S. M. Morán
L. A. Nédjar
R. M. Noda
A. Pomé
C. A. Ponze
C. I. Rodríguez
L. Rossignuolo
R. Sánchez
S. Sánchez
C. Tejada
N. Toro
M. D. Suere Valdés
C. F. Vargas
O. Willemstijn

Considering the PAHO's observations of 28 October 1999 on these applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants who are employed at the PAHO's headquarters in Washington, D.C. are in the General Services category.

In 1991, the Director of the PAHO decided to adopt the United Nations Global Classification Standard for Non-Headquarters Duty Stations (hereinafter "the Standard"). The application of the Standard implied the conversion of the salary scale for the General Services category from an eight-grade to a seven-grade scale. For this purpose, job description questionnaires for all General Services positions had to be completed by each department. In 1995, in its capacity as "lead agency" for the duty station, the Organization was charged with implementing the Standard for all General Services staff in United Nations institutions with their headquarters in Washington, D.C.

In a letter of 11 April 1995 the Chief of Personnel of the PAHO informed the Chairperson of the Staff Committee of the Washington Local

Organization* that she would appreciate the designation by the Staff Association of two representatives and two alternates to participate in a working committee to implement the conversion process.

By a letter of 1 May the Chairperson of the Staff Committee informed the Chief of Personnel that the Committee declined her invitation on the grounds that the participation of representatives of the Staff Association was contrary to the provisions of the PAHO/WHO Manual. By a letter of 19 May to the Chairperson of the Committee, the Chief of Personnel once again invited the Staff Association to designate participants to observe or collaborate in the process. By a letter of 30 June, the Chairperson of the Committee replied that the Committee accepted the offer to participate as observers and, in a letter of 31 July, he informed her of the names of two observers and an alternate. One of the observers was an external consultant. In a letter dated 8 August, the Chief of Personnel told the Chairperson of the Committee that observers had to be staff members and that she was not able to accept the participation of the consultant.

In an information bulletin dated 11 August, the Washington Local Organization indicated that it had decided to entrust the external consultant with the task of reviewing the classification of General Services posts.

In a letter of 13 November, the Chairperson of the Committee requested the Director of the PAHO for a copy of the final report on the salary scale compression exercise. In a communication dated 19 December, the Director replied that he could not comply with the request, which he felt was inconsistent with the Staff Association's decision not to become part of the process.

On 20 December 1995, the Department of Personnel issued General Information Bulletin No. 95-58, informing headquarters staff of the conversion of the salary scale. It also indicated that new job descriptions would be distributed during the first quarter of 1996.

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* The PAHO/WHO Staff Association is organised on two levels. At the level of duty stations, a Local Organization may be formed whose elected leadership makes up the Staff Committee. An organization of this nature exists in Washington – the Washington Local Organization. The supreme authority of the Staff Association is the Council, which is composed of the presidents of all the Local Organizations and meets once a year. Between meetings of the Council, an elected group of seven members, called the Executive Committee, implements its decisions and deals with employment issues.

Fifty-seven staff members filed appeals concerning the results of introducing the Standard. Their counsel wrote to the Chief of Personnel on 15 March 1996 to inform her that each appellant requested, inter alia, the old post description existing prior to the introduction of the Standard, the new post description resulting from the implementation of the Standard and the point rating worksheet used by the classification officers. By a letter of 25 April the Chief of Personnel sent the counsel the post descriptions which existed prior to the application of the Standard and a blank copy of the worksheet. She indicated that the new job descriptions were being finalised. In a letter dated 2 May the counsel asked the Chief of Personnel to provide him with the worksheets containing the values awarded and the comments made by the classification officers. The Chief of Personnel advised him in a letter of 20 June that she would not provide them because they were confidential documents.

In a communication to the Director dated 25 November 1996, the President of the Executive Committee of the Staff Association observed that 82 per cent of the posts had received different classifications by the Department of Personnel and the Washington Local Organization's consultant. The Staff Association took the case to the headquarters Board of Inquiry and Appeal, which issued its opinion on 18 May 1998. Its recommendations to the Administration included providing the Washington Local Organization with a table, taken from the report to the Director on the application of the Standard, and each General Services staff member with an up-to-date post description. In a letter of 9 July 1998, which is the impugned decision, the Director provided each appellant with a copy of the table. He added that the vast majority of new post descriptions had already been provided to the General Services staff members.

B. The complainants contend that the PAHO failed to provide reasons for its classification decisions. Citing the case law of the Tribunal, they assert that a discretionary decision must be explained sufficiently well to enable staff members to defend their interests and an appeals body and the Tribunal to exercise the power of review. In the present case, they say that the Administration failed to provide the complainants with the necessary information to enable them to verify that the classifications had been made correctly, namely the final report on the compression exercise, the new post descriptions and the worksheets.

Once again citing the Tribunal's case law, they allege that the Organization was in breach of the principle of good faith and the principle that staff members have the right to be kept informed of any action which may affect their rights or legitimate interests. They say that the PAHO used the non-participation of the Staff Association in the compression exercise as a pretext to deny staff members the information which they were claiming.

The complainants submit that the PAHO violated WHO Manual paragraph II.5.40 under which, in their view, a staff member is entitled to have a copy of an up-to-date post description at all times.

Finally, they suspect the Organization of being in violation of the Standard. The fact that post descriptions were still being prepared even after the conversion exercise had been completed implies that the tasks and responsibilities had been evaluated before they were final and official. The extent of the discrepancies between the classifications made by the Department of Personnel and by the Washington Local Organization's consultant is an additional reason for fearing that the process was flawed.

The complainants request the Tribunal to order the PAHO to provide them with a copy of the point rating worksheet actually filled out by the Department of Personnel and to repeat the classification study for their posts. As the PAHO acted unlawfully they claim compensation for the moral damages suffered. They also claim costs.

C. In its reply the PAHO submits that, under the terms of Staff Rule 210, the Director enjoys broad discretion in the establishment of classification plans. It adds that, in accordance with its case law, the Tribunal only exercises a limited power of review in this respect. By aligning the system applicable to the General Services staff of the PAHO with that of their colleagues on the rest of the continent, the Director was merely applying a recommendation intended to cover the whole of the United Nations system.

The Organization asserts that it fully complied with the Staff Rules and Regulations and the general principles of law. It says that it kept its staff informed of all decisions regarding the application of the Standard and the reasons for them. Nevertheless, it contends that giving reasons for a decision does not entail the disclosure of all the documents produced on a given subject, which would paralyse the work of any organization. Since the questionnaires and the results of applying the Standard were communicated to all the staff, the complainants had sufficient information at their disposal to defend their interests. Based on the case law of the Tribunal, the PAHO contends that it is entitled to withhold confidential documents.

The Organization asserts that it was under no obligation to invite the Staff Association to participate in the negotiations. Its offer to do so was made in good faith.

It says that WHO Manual paragraph II.5.40 has no bearing on the implementation of the Standard. The complainants cited it out of context.

The PAHO argues that it applied the Standard correctly. The sole document used to prepare the list of tasks and responsibilities was the "Model Job Description Questionnaire", and not the post description itself. It adds that interviews were arranged between staff members and their supervisors to clarify the nature of their duties. These were then evaluated and the point values recorded on the worksheets.

It asserts that the Staff Association's expert lacked a thorough understanding of the Standard, since he had virtually no knowledge of the Organization or its structure. This may explain the discrepancies between his classification and the classification made by the Department of Personnel.

Since the complainants do not show any injury resulting from the implementation of the Standard, the PAHO wonders why they filed a complaint.

D. In their rejoinder the complainants add that official reasons for individual classification decisions only appear in the worksheets. Nevertheless, they offer to withdraw their complaints if the Administration provides them with an official document containing the same information as the worksheets. They assert that the injury which they are suffering lies in the fact that they have been denied information to which they are entitled.

Citing WHO Manual II.3.290, they refute the PAHO's argument and assert that post descriptions are indeed taken into account for the classification of posts.

E. In its surrejoinder the PAHO presses its arguments and recalls that the headquarters Board of Inquiry and Appeal deemed that the table taken from the report to the Director was "equivalent" to the worksheets.

CONSIDERATIONS

1. Despite the size of the pleadings generated by this complaint, there is basically only one single issue to be determined, namely, whether the complainants are entitled to the production of the actual worksheets used by the classification officers in the implementation by the Organization of the new United Nations Global Classification Standard for Non-Headquarters Duty Stations (hereinafter "the Standard"). It is the implementation process of that Standard for the General Services posts in the PAHO's headquarters in Washington, D.C. which is the subject of this case.

2. The relief sought in the complaint is to order the Organization:

(1) To provide each of the complainants with a copy of the point rating worksheet actually filled out by the Personnel Department in order to attribute points to each complainant's post.

(2) To repeat the exercise of classification of the complainants' posts.

(3) To pay moral damages for the PAHO's "violations of the law".

(4) To pay legal costs.

3. The origin of the dispute lies in the decision of the Organization to implement the Standard through an ad hoc committee, set up by the Director of the PAHO, in which the Staff Association refused to participate as full members. After the results of the exercise had been completed and made known to individual staff members, fifty-seven staff members appealed to the headquarters Board of Inquiry and Appeal.

4. In its report the Board found as follows:

> "7. Post descriptions were not provided to staff within a reasonable amount of time after completion of the exercise. According to the appellants' brief, approximately a year and a half after completion, appellants still did not have their new post descriptions.
>
> ...
>
> 10. Table 4 of the Report to the Director on the Application of [the Standard] contains point-factor ratings and the total scores assigned to every post for the compression exercise. The information contained in this table is equivalent to that included in the individual score sheets prepared for each post, and was not found by the Board to be confidential in nature.
>
> ...
>
> 12. There is no evidence that the appellants suffered moral damages."

5. The Board recommended, inter alia, that:

> "1. The Administration provide [the Washington Local Organization] with Table 4 of the Report to the Director on the Application of [the Standard] containing only the information for the appellants.
>
> 2. The Administration provide each [General Services] staff member with an up-to-date post description.
>
> ...
>
> 5. The Administration not pay moral damages."

6. In his final decision of 9 July 1998, which is the decision impugned, the Director said inter alia:

> "1. In light of the unique nature of the compression exercise, which involved the application of [the Standard] I exceptionally agree to this recommendation. Therefore, Table 4 of the report, as applied to the Appellants, is provided as Attachment 1.
>
> 2. As you are aware, the process of reviewing post descriptions is on-going and reviews are performed at the request of staff members and/or supervisors. The vast majority of post descriptions involved in the entire exercise have already been provided to General Services staff members, and we are making every effort to complete the few that remain by the end of July 1998. Post descriptions that are pending completion either due to changes in the functional

structure of specific units or are in the process of reclassification will be finalized in due time."

The Director further agreed that no moral damages should be paid.

7. The complainants have four pleas.

(1) By not producing the point rating worksheets used by the classification unit the Organization has failed to provide the necessary complete information. This makes it impossible for them to defend their interests and for the Tribunal to review the classification decisions.

(2) Referring to the fact that the Organization did not accept the Staff Association's alternative proposals to the compression exercise, they contend that the PAHO was in breach of the duty of consideration it owed the staff: it failed to act in good faith and failed to keep staff informed about important matters affecting their rights and interests. The treatment of staff was demeaning and there was a deliberate denial of information.

(3) The Organization has violated WHO Manual paragraph II.5.40 which the complainants claim requires that a staff member should be entitled to have a copy of an up-to-date post description at all times.

(4) The Organization is in violation of the Standard because, in the announcement of the completion of the conversion exercise, the staff were told they would each receive a form giving their grade under the new scale "within the next few weeks" and that the new post descriptions were "being prepared and [would] be distributed during the first quarter of 1996". The complainants say that the implication is that tasks and responsibilities were evaluated before they were "final and official".

8. The three complainants were confirmed at their respective grade levels and maintained their salaries, benefits and responsibilities. The Organization contends that they were unaffected by the exercise and therefore have no cause of action.

9. As to the claim of the complainants to receive the actual point rating worksheets, the Organization submits these are confidential. They

are, says the PAHO, the "opinion work-product" of the classifiers and are not person-specific. The Organization gave all the worksheets to the Board of Inquiry and Appeal and the Board did not order that they be made available. The Organization is willing to submit all the worksheets to the Tribunal if so requested.

10. The PAHO states that the rating on each worksheet could change over various stages in the course of the working committee's review process. The application of a new classification standard to posts in the Organization is a management measure which has no relation to individuals but rather to posts within a formal organisational structure.

11. The Board found that the information contained in Table 4 of the Report to the Director was "equivalent to that included in the individual score sheets prepared for each post", and it was subsequently made available to the complainants.

12. Ordinarily, the complainants would not be entitled to internal working management documents. In this case, however, they have been provided with sufficient information to enable them to pursue their interests. Their suspicion that the "tasks and responsibilities were evaluated before they were final and official" is without foundation.

13. The complainants base their allegations that the Organization failed to show consideration for the staff, failed to act in good faith and failed to keep the staff properly informed on two factors: (1) a deliberate denial of information and (2) the "demeaning" treatment of staff resulting from the Organization's original proposal for Staff Association participation in the working committee, which they say violated the rules of the Organization, and the Organization's failure to accept the Staff Association's alternative proposals.

14. The Tribunal is satisfied that there was no deliberate denial of information and does not accept that there was any demeaning treatment of staff.

15. The Tribunal is satisfied that the Organization did not fail to provide all the information necessary for the complainants to pursue their interests and accordingly will not order the production of the actual worksheets or a repetition of the classification study of each complainant's post. None of them suffered moral injury.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Sokolov** **Judgment 1940**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Dmitri Konstantinovich Sokolov against the World Health Organization (WHO) on 25 June 1998 and corrected on 30 October 1998, the WHO's reply of 15 February 1999, the complainant's rejoinder of 4 March and the Organization's surrejoinder of 7 June 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is of Russian nationality and was born in 1929. He was employed at the WHO's Regional Office for Europe in Copenhagen from 23 November 1974 to 30 November 1980 when he resigned. At that time he was the Director of Comprehensive Health Services.

In October 1980 the United Nations Joint Staff Pension Fund entered into an agreement with the then Union of Soviet Socialist Republics regarding the transfer of pension rights. The agreement came into effect on 1 January 1981. Under its terms a staff member who was working in one of the Fund's member organisations, who was a participant in the Fund and was on secondment from the public service of the Soviet Union, could elect to have a lump sum payment transferred to the Social Security Fund of the Soviet Union.

Before he left the Organization the complainant requested the deferral of his retirement benefit and filled out a "payment instructions" form, which he signed on 3 November 1980. More details were needed from him and an exchange of correspondence ensued between the WHO Staff Pension Committee and the complainant. In a letter of 28 October 1981 the Secretary of the Committee mentioned the new pension transfer system to the complainant, but when the complainant replied on 22 November 1981, asking for further deferral of his retirement benefit, he said he wanted his payment instructions of 3 November 1980 to be applied in his case and wanted no part in the transfer arrangement.

In March 1982 the Pension Fund paid a lump sum to the Social Security Fund of the Soviet Union on the complainant's behalf. In so doing it had relied on an application for transfer dated 22 November 1981 and signed "D. Sokolov".

The complainant challenged the transfer in a letter of 15 October 1989, which was received by the Pension Fund on 18 January 1990. The Secretary of the Fund replied on 19 January 1990: he sent the complainant a copy of the application form dated 22 November 1981 requesting the transfer of his pension and said "this choice cannot be reversed". The complainant took the matter up in the Russian courts, which led to a negative decision dated 10 June 1998 from the Supreme Court of the Russian Federation. On the same day the complainant says he appealed to the Director-General of the WHO. Having received no reply he retyped the letter and sent it to the Director-General on 2 August 1998.

In a letter of 12 August 1998 the acting Secretary of the WHO Staff Pension Committee informed him that his case had been referred to the Standing Committee of the United Nations Joint Staff Pension Board for review.

B. The complainant asserts that his complaint is receivable as he filed it with the Tribunal against the implied rejection of his appeal of 10 June 1998 and in accordance with Article VII(3) of its Statute.

He pleads that the transfer of his pension rights was unlawful, and that he was "dispossessed" of his "pension accumulation".

When he finished his contract in November 1980 he filled out payment instruction forms. It is clear from these forms that he had asked the WHO to pay his pension to him "personally". The WHO also ignored similar forms that he had sent the Secretary of the Staff Pension Committee with his letter of 22 November 1981. In that letter he had stated that he was against the transfer of his pension and again said he wanted to receive the amount due himself.

In its letter of 28 October 1981 the WHO asked him to "renounce [his] pension rights", but he did not wish to sign the form requesting the transfer. Nonetheless, on 22 November 1981, somebody else at the WHO signed it for him, imitating his signature. On the basis of that forged document his pension entitlement was transferred to a non-existent address, as the Social Security Fund of the Soviet Union had "never existed".

The WHO breached the terms of the transfer agreement, which was approved by the United Nations General Assembly on 17 December 1980 at its Thirty-fifth Session, and did not respect the rules implementing it. The aim of the agreement was not to "bereave" participants of their pension rights: under its terms transfer was optional. The WHO exceeded its authority and betrayed his trust. The secretariat of the Staff Pension Committee had kept secret that his pension entitlement was to be transferred "to the budget of the State" and failed to respond to his letters.

He wants the Tribunal to order the WHO to "put [his] pension papers in order" in accordance with the payment instruction forms he gave it. He seeks: an award of material damages, in an amount to be determined by the Tribunal, taking into account the sum of 54,618 United States dollars which he based on "actuarial values" and interest; and 19,506 dollars in moral damages representing 30 per cent of his "pension accumulation".

C. In its reply the Organization points out that all original records concerning the complainant's pensions rights are held by the Fund and cannot be made available to the Organization. Moreover it does not have copies of all the correspondence produced by the complainant.

To be receivable his appeal should have been filed with an internal appeals board within sixty days of his receiving a decision or "final action". Any appeal in relation to any "administrative action or decision affecting his appointment status" under Staff Rule 1230.1 was time-barred long ago. The complainant took his case to the United Nations Administrative Tribunal, which considered it irreceivable at that stage because the Standing Committee had yet to review it. The Committee subsequently confirmed the decision not to reopen the matter of the transfer and the complainant appealed against that decision to the United Nations Administrative Tribunal. Those proceedings have not yet been completed and it is up to that Tribunal alone to decide on his case.

On 6 January 1982 the Pension Fund received the complainant's separation papers from the WHO, and they included the complainant's request for application of the transfer agreement, a document signed by "D. Sokolov"; so the transfer of a lump sum was made by the Pension Fund to the Social Security Fund of the Soviet Union in March 1982. Therefore, the complaint relates to a dispute between the complainant and the Pension Fund, which falls outside the jurisdiction of this Tribunal.

The complainant has adduced no proof that any WHO official exerted pressure on him to transfer his pension or forged his signature. With regard to the allegation that it failed to answer letters from him, it has no record of receiving any until August 1998 and he has submitted no proof that he sent any. In any event, if the WHO had received correspondence regarding the transfer, it would have referred the complainant to the Pension Fund.

D. In his rejoinder the complainant presses the receivability of his claim. The complaint lodged by him concerns the WHO, and he filed it with the appropriate Tribunal.

He argues that the transfer agreement came into effect after he had stopped contributing to the Fund. There was no legal basis for the transfer of his pension entitlements and he did not fulfil several of the conditions listed in the agreement. A single form activated his transfer. There was no covering letter to show it had really come from him and a graphology test proved that the signature on the document of 22 November 1981 was an imitation. The WHO did not even inform him that he would no longer be getting the lump sum.

He was discriminated against as other people he worked with have now received a pension from the Pension Fund and, because he is Russian, he is the only one who has not.

E. In its surrejoinder the Organization says that the decision of the United Nations Tribunal was expected in October or November 1999. Should the Tribunal wish to consider documents put forward by the Pension Fund to the United Nations Tribunal, the submissions can be made available. Although the complainant now contends he did not fulfil the conditions for the transfer of his pension rights, the Fund decided in 1982 that the complainant was entitled to benefit from the transfer agreement.

According to information made available to the Standing Committee of the Joint Staff Pension Board the transfer system was perceived as being favourable to former participants, and it was the complainant who requested the transfer. No other participants from the Soviet Union claimed that the agreement was not applied as intended or that the Social Security Fund did not exist. In addition the complainant has not provided the results of the graphology test he mentions.

With its surrejoinder the Organization produces the payment forms the complainant purportedly attached to his letter of 22 November 1981 asking to have his pension paid to him personally, and comments that those particular forms came into being only in 1988.

It also notes that the Fund's Secretary had written to the Soviet Union's Mission to the United Nations in New York on 20 March 1984 stating the amount it was transferring to the Soviet Union on behalf of the complainant. The letter mentioned the form of 22 November 1981 applying for the transfer, but although the complainant received a copy of that letter he did not contest it at the time.

CONSIDERATIONS

1. The complainant, who was a national of the then Union of Soviet Socialist Republics, was employed at the WHO's Regional Office for Europe from 23 November 1974 to 30 November 1980, when he resigned. He was fifty-one years old at the time of his resignation and requested a deferred retirement benefit. The Organization exchanged correspondence with him to complete his file so that it could be transmitted to the United Nations Joint Staff Pension Fund, the competent body for the payment of his pension entitlements. But in October 1980, the Soviet Union and the Pension Fund had entered into an agreement under which staff members on secondment from a public service of the Soviet Union and who had contributed to the United Nations pension scheme could opt for a system whereby a lump sum would be transferred to the Social Security Fund of the Soviet Union. According to a document dated 22 November 1981, which has been produced by the WHO in its reply, the complainant requested the application of the agreement in his case and, in March 1982, the lump sum to which he was entitled was transferred to the Social Security Fund of the Soviet Union. At the end of 1989, the complainant challenged the validity of this payment and requested the Secretary of the Pension Fund to cancel the transfer made in 1982. This request was rejected on 19 January 1990 on the basis of the document signed in the complainant's name on 22 November 1981. The Standing Committee of the Joint Staff Pension Board confirmed this decision which, it appears, he then referred to the United Nations Administrative Tribunal. According to the WHO, the latter Tribunal has not yet ruled on the case.

2. The complainant alleges before this Tribunal that the WHO unlawfully imposed upon him the transfer of his pension rights to the Social Security Fund of the Soviet Union. He requests the Tribunal to order the WHO to "put [his] pension papers in order" in accordance with his initial instructions and to grant him various sums in compensation for the material and moral damages which he claims to have suffered.

3. Insofar as the complainant is seeking to obtain a judgment from the Tribunal on the extent of his pension rights, it is clear that the decisions taken by the Pension Fund lie exclusively within the jurisdiction of the United Nations Administrative Tribunal and cannot be reviewed by this Tribunal. The WHO's responsibility could only be impugned if it were to emerge that the decisions taken by the Organization or pressure exerted by it induced the complainant into error or contributed to the loss of his pension rights.

4. However, on these points, the complainant's arguments must be dismissed. Admittedly, in support of his claims he produces a letter of 22 November 1981 to the Secretary of the WHO Staff Pension Committee, in which he explicitly rejected the system envisaged in the agreement between the Pension Fund and the Soviet Government. This letter has the same date and, apparently, the same signature as the one by which he accepted the application of the agreement in his case. The complainant refers to pressures exerted upon him and asserts that the signature of the letter of acceptance was forged. But there is no proof of the authenticity of the letter which he produces rejecting the transfer and there is no evidence to support his allegations that pressure was exerted upon him. The Tribunal notes in this respect that he had been aware, at least since 19 January 1990, when the Secretary of the Pension Fund informed him by letter, that the decision to transfer his pension rights had been taken on the basis of the letter of acceptance of 22 November 1981 bearing his signature. Yet it was only in 1998 that he complained to the Director-General of the WHO concerning the alleged forgery.

5. There is no evidence of any flaw in the manner in which the WHO discharged its obligations in 1981. Furthermore, it is not within the Tribunal's jurisdiction to examine the dispute between the complainant and the United Nations Joint Staff Pension Fund. Therefore, without it being necessary to order hearings or to rule on the WHO's plea that the complaint is out of time and therefore irreceivable, all of the complainant's claims must fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Ochani (No. 5)** **Judgment 1941**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 1 June 1998, the WHO's reply of 8 September, the complainant's rejoinder of 20 November 1998 and the Organization's surrejoinder of 17 February 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details of events forming the background to this case are to be found in Judgments 1856 and 1857, delivered on 8 July 1999, on the complainant's second and third complaints.

The complainant is a former staff member of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. His service was terminated on 5 August 1996.

On 3 March 1997 he went to see the staff health insurance assistant at SEARO to settle a pending claim relating to the reimbursement of medical expenses. During the discussion a scuffle broke out between them, a lens from the complainant's glasses was broken and documents from the complainant's file were torn up.

The complainant wrote to the Regional Director on 6 May 1997 claiming awards of compensation for the grievance caused by the incident of 3 March. In the absence of a reply he assumed that his claim had been rejected and on 19 August appealed to the regional Board of Appeal, which in its report of 11 September concluded that the appeal was irreceivable and recommended that it should be dismissed. In a letter of 30 September the Regional Director endorsed that opinion. On 17 November 1997 the complainant went to the headquarters Board of Appeal, which in its report of 27 March 1998 came to the same conclusion and recommended the dismissal of his appeal. By a decision of 4 May 1998, which the complainant impugns, the Director-General endorsed that recommendation.

B. The complainant gives an account of the incident of 3 March 1997. The Regional Personnel Officer intervened in the scuffle and kept him confined in a room for nearly two and a half hours. On being released the complainant reported the matter to the police.

The Regional Director, he submits, dismissed his appeal on the ground that he was no longer a staff member when the incident took place. The Director-General rejected it citing the conclusion of the headquarters Board that his case "did not fall within its mandate as an administrative appeal body" as he "had been dismissed from WHO in August 1996", again meaning he "could not be considered as a former staff member".

The Tribunal's Statute clearly states, in paragraph 6(a) of Article II, that the Tribunal shall be open to an official "even if his employment has ceased". It was the Administration that called him to its premises to receive payments due to him as a former staff member, so it cannot now plead that he is not "a former staff member". The behaviour of the Regional Personnel Officer and the insurance assistant amounted to "criminal misconduct" and was in breach of Staff Rule 110.8. The complainant argues that in keeping with "the principles of natural justice" he should be awarded suitable compensation and damages for material and moral injury.

He seeks awards totalling 7,023,205 United States dollars in compensation for: material injury caused through physical violence; "mental agony ... and loss of social reputation"; illegal confinement; replacement of his spectacles; taxi fare; and legal costs. The sum awarded should include a "personal penalty" imposed on the Regional Personnel Officer and the insurance assistant.

C. In its reply the Organization contends that the complaint is irreceivable as the complainant is not challenging any administrative decision affecting his past appointment status. The terms of Staff Rule 1230.1 do not preclude a former staff member from lodging an appeal, but to be receivable it must relate to his former employment status, and be filed within set time limits. The complainant filed his appeal with the regional Board of Appeal on 19 August 1997 – more than one year after the cessation of his employment and it was therefore time-barred. The headquarters Board rightly concluded that the appeal did not comply with the stipulations of Staff Rule 1230.1, and that his case fell outside its competence as an "administrative body".

Paragraph 6(a) of Article II of the Tribunal's Statute, cited by the complainant, is to be read in conjunction with paragraph 5 which says that the Tribunal is competent to hear complaints alleging non-observance of "terms of appointment" and of "provisions of the Staff Regulations".

On the merits the Organization contests the complainant's version of the incident of 3 March and cites reports written by the officials involved describing what happened. He was not subjected to physical violence and had himself caused the incident.

In view of the frivolous and vexatious nature of the complaint it asks for an award of nominal costs against the complainant.

D. In his rejoinder the complainant pleads that his complaint is receivable. The WHO is answerable for acts of its officials which amount to misconduct linked to the "performance of their assigned duties". The phrase "appointment status" in Staff Rule 1230.8 and "observance in substance and form of the terms of appointment" in the Tribunal's Statute are "wide" enough to include the obligation to treat former staff members with dignity and respect and protect them from arbitrary acts by officials. He has every right to invoke the Staff Rules and seek redress for the indignity inflicted on him.

The reports on the incident produced by the Regional Personnel Officer and the Budget and Finance Officer were dated 4 March 1997, a day after it occurred and were "fabricated as an afterthought".

E. The Organization, in its surrejoinder, presses its objections to receivability. On the merits it submits that the reports produced by the officials involved were truthful accounts of what took place during the incident. Referring to the complainant's claim that a personal penalty should be imposed on the officials involved, it asserts that such a claim is without merit and not one that the Tribunal has competence to rule on.

CONSIDERATIONS

1. The complainant joined the staff of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi in 1988. In December 1995 he submitted a claim under the Staff Health Insurance scheme for the reimbursement of dental treatment for a sum of 2,662 United States dollars and produced two altered receipts as justification. By a letter of 31 July 1996, he was dismissed for misconduct, with effect from 5 August 1996.

2. On 3 March 1997, and therefore well after his dismissal, while the complainant was on the premises of the SEARO, a violent incident occurred between him and a staff member of the Organization, of which each party gives its own version.

The complainant asserts that he went to the SEARO offices at the request of an official responsible for health insurance to settle a claim relating to the reimbursement of medical expenses. As the complainant refused to return a cheque issued in error, the official grappled with him and his glasses were broken. After the incident, the complainant was forced to remain on the Organization's premises for two-and-a-half hours.

The version of the incident given by the defendant is entirely different. It submits that the complainant asked to see his file, snatched it from the hands of the official and then destroyed the two receipts which he had altered and which were in his file.

3. On 6 May 1997, the complainant claimed compensation from the Regional Director of 7,010,000 dollars and 112,150 rupees in physical and moral damages. Not having received a reply from the Organization, he appealed to the regional Board of Appeal on 19 August 1997. On 11 September 1997, the Board concluded that the appeal was irreceivable. The Regional Director endorsed that opinion in a letter to the complainant dated 30 September.

On 17 November 1997, the complainant appealed to the headquarters Board of Appeal against the Regional Director's decision. The headquarters Board also found that the appeal was irreceivable and its opinion was endorsed by the Director-General on 4 May 1998.

4. Once the internal remedies had been exhausted, the complainant filed his present complainant with the Tribunal on 1 June 1998. His claims are to be found under B above.

5. The Organization asserts that the complaint is irreceivable and does not fall within the competence of the Tribunal.

6. The complainant appealed to the Regional Director on 6 May 1997, while the material facts giving rise to his appeal occurred on 3 March 1997 and his employment with the WHO had ceased on 5 August 1996. He is not now challenging any decision or measure relating to his situation as a former staff member of the Organization and does not put forward any arguments deriving from a breach of his contract or the conditions under which it was decided not to renew it. The Tribunal is not therefore competent, under Article II of its Statute, to hear the complaint.

7. The Tribunal holds that, in the circumstances of the case, there are no grounds for allowing the Organization's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organization's counterclaim is also dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Ochani (No. 6)** **Judgment 1942**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 11 June 1998, the WHO's reply of 21 September, the complainant's rejoinder of 20 November 1998 and the Organization's surrejoinder of 17 February 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details of events forming the background to this case are to be found in Judgments 1856, 1857 and 1858 on the complainant's second, third and fourth complaints.

The complainant is a former staff member of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. His service was terminated on 5 August 1996.

The complainant was on sick leave from 9 April to 26 May 1996. On 9 April SEARO had a letter delivered by messenger to his home asking him to explain in a letter, by 19 April, why there were discrepancies on two receipts he had submitted relating to his son's dental treatment that he wanted reimbursed. While he was in a clinic, the regional staff physician and staff nurse made attempts to contact the complainant by phone.

The complainant wrote to the Regional Personnel Officer on 11 June 1996 complaining of the way he had been "harassed", and holding him responsible. Having received no response, on 12 September 1996 the complainant wrote to him again, claiming compensation for the "biased actions" taken against him while he was on sick leave, and which had affected his health. In the absence of a reply he appealed to the regional Board of Appeal on 5 February 1997. In its report of 12 September 1997 the Board concluded that his appeal was irreceivable as it had not been filed within the applicable time limit and he had not challenged any final decision taken by the Administration. The Regional Director informed the complainant of this on 30 September 1997 and dismissed his appeal. On 17 November the complainant filed an appeal with the headquarters Board of Appeal which, on 12 May 1998, also recommended rejecting it. The Director-General endorsed that recommendation on 5 June 1998, which is the decision the complainant now impugns.

B. The complainant submits that the Administration kept on "hounding" him from the first day of his sick leave first at home, and then in the nursing home to which he was admitted. Inquisitive and demanding telephone calls were made to him or his attending doctors by the regional staff physician and the staff nurse, which he assumes were prompted by the Regional Personnel Officer. He recorded some calls from the staff nurse on cassette and forwarded copies to the regional Board of Appeal. On 15 April 1996 he even received a written notification from one of the doctors in the clinic telling him that the SEARO medical services wished to contact him. During his leave and up until he was dismissed he suffered "relentless and merciless harassment", which took its toll, severely affecting his health. He refers to the 'personal animosity' of the Regional Personnel Officer towards him.

He seeks compensation of 1,000,000 United States dollars "for suffering irretrievable damage to his physiological system". In view of the permanent injury caused to him he asks for reassessment of his pension rights in line with the provisions on "Compensation Payments" in the WHO Manual. He also claims $10,000 in costs.

C. In its reply the Organization contends that the complaint is irreceivable as it does not challenge any administrative decision that affected the complainant's past appointment status or breached the Staff Regulations or Rules. The complainant's claim that he was subjected to harassment is vague and unsubstantiated. Moreover, there was little resemblance between the claims the complainant made in his demand of 12 September 1996 to the Regional Personnel Officer and his main pleas in his internal appeal of 5 February 1997. In his letter of 12 September he chiefly sought the imposition of disciplinary measures and a personal penalty on the Regional Personnel Officer, whereas his internal appeal centred on allegations of harassment on the part of the regional staff physician and staff nurse while he was on sick leave, for which he claimed compensation. Therefore, he did not appeal against an implied rejection of his demand of 12 September, but rather filed a new claim - outside the prescribed time limits and six months after he ceased to be a staff member.

The Organization justifies the appropriateness of sending the letter of 9 April 1996 by messenger to the complainant's home, and does not see that as harassment. No authorisation had been given for the complainant's absence from duty. The regional staff physician had examined the complainant the previous day and had not advised sick leave or urgent surgery.

Even if the complainant alleges that he made recordings of telephone calls by SEARO medical staff to his residence he has provided no such evidence to the Organization. The regional staff physician and staff nurse telephoned him in their official capacity to find out the date of his return to duty. The written notification that one of his doctors sent him on 15 April 1996 was courteous in tone and did not constitute harassment.

In view of the frivolous nature of the complaint the Organization asks for an award of nominal costs against the complainant.

D. In his rejoinder the complainant argues that he filed his internal appeal within the prescribed time limits, and pleads that his complaint is receivable. He presses his pleas.

He holds that there was no deviation between the claims he made in his internal appeal and those he put forward in his initial letter of 12 September 1996. The complainant refers to insinuations made by the Regional Personnel Officer in correspondence addressed to him in May 1996 and is of the view that a personal penalty should be imposed on that official.

E. The WHO, in its surrejoinder, maintains its earlier arguments on the irreceivability of the complaint. It points out that the complainant concentrates in his rejoinder on the alleged personal prejudice towards him of the Regional Personnel Officer. It rejects the complainant's claim that a penalty be imposed on that official. His claim is groundless and, being new, is irreceivable.

CONSIDERATIONS

1. The complainant entered the service of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi in 1988. He was dismissed for misconduct after having failed to provide a satisfactory explanation as to why he had produced two altered receipts in support of a claim for the reimbursement of his son's dental treatment in the United States. His dismissal took effect on 5 August 1996.

2. The complainant asserts that he suffered harassment by officials of the Organization while he was on sick leave between 9 April and 26 May 1996. He says that this harassment caused serious damage to his heart and brain, for which he claims compensation. He assesses the injury suffered at 1,000,000 United States dollars and requests the reassessment of his pension rights, as well as 10,000 dollars in costs.

3. On 12 September 1996, the complainant claimed compensation of 1,000,000 dollars from the Organization for the injury suffered. Not

having received a reply, he filed an appeal on 5 February 1997 with the regional Board of Appeal. On 12 September 1997, the Board concluded that the appeal was irreceivable. The Regional Director confirmed this decision in a letter to the complainant dated 30 September.

On 17 November 1997, the complainant appealed to the headquarters Board of Appeal against the Regional Director's decision. The headquarters Board also concluded on 12 May 1998 that the complainant's claim was irreceivable. This opinion was endorsed by the Director-General on 5 June 1998.

4. Once the internal remedies had been exhausted, the complainant came to the Tribunal on 11 June 1998. He seeks 1,000,000 dollars in compensation, the reassessment of his pension rights in view of the permanent nature of the injury suffered, and 10,000 dollars in costs.

The defendant rejects the complainant's allegations, considers that the complaint is clearly frivolous and requests the Tribunal to award it nominal costs.

5. Taking into account its decision on the merits, the Tribunal will not examine the issue of the receivability of the complaint.

6. A general principle of law, set out in the Tribunal's case law on several occasions, has it that for a claim for damages to be entertained, the complainant must provide evidence of the actual injury and of a causal link between the unlawful act and the injury suffered.

In the present case, the complainant claims to have been the victim of harassment which he says caused him injury in a sum that he sets at 1,000,000 dollars. However, the complainant confines himself to mere allegations and does not provide any evidence of the truth of his assertions. The results of certain medical examinations are not sufficient to demonstrate that the Organization is responsible for the deterioration of his state of health resulting from any harassment by certain of its officials at SEARO, whose personal responsibility must in any case be excluded.

7. The Tribunal holds that, in the circumstances of the case, there are no grounds for allowing the Organization's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organization's counterclaim is also dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-EIGHTH SESSION

***In re* Ochani (No. 7)** **Judgment 1943**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 27 June 1998, the WHO's reply of 2 October, the complainant's rejoinder of 18 December 1998 and the Organization's surrejoinder of 29 March 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of India born on 28 September 1937, is a former staff member of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. His last contract was due to expire on 30 September 1997 on his reaching retirement age, but his service was terminated on 5 August 1996 under circumstances related in Judgment 1856 on his second complaint.

In July 1990 all WHO staff were notified of an amendment to Staff Rule 1020.1. That Rule now reads:

> "Staff members shall retire on the last day of the month in which they reach the age of 60. However, staff members who have become participants in the United Nations Joint Staff Pension Fund on or after 1 January 1990 shall retire on the last day of the month in which they reach the age of 62."

The retirement age of 60 was applicable to the complainant as he had been in service from 1988 to 1996. However, on 14 April 1997 he wrote to the Regional Director asking that his notional retirement age be raised to 62 on a par with officials who became participants in the Pension Fund after 1 January 1990. Having received no response he appealed, on 26 August 1997, to the regional Board of Appeal, which concluded in its report of 11 September that his appeal was irreceivable. That was confirmed to him by the Regional Director in a letter of 30 September and he lodged an appeal with the headquarters Board of Appeal on 17 November 1997. In its report of 19 March 1998 the Board found that his appeal was time-barred as he had failed to contest the general decision regarding the retirement age contained in Rule 1020.1 when it was notified to all staff in July 1990. The Director-General notified the rejection of his appeal in a letter of 15 April 1998, which the complainant impugns.

B. The complainant wants to benefit from the higher retirement age of 62 so that he might have a longer tenure of service in the event of his previous appeal against his dismissal leading to reinstatement. He submits that the decision to choose 1 January 1990 as the determining date in the amended version of Staff Rule 1020.1 was an arbitrary one. It breached the principle of equal treatment as staff like him, in service before that date, were discriminated against. There was no justification for extending the benefit of the raised retirement age to certain staff and not to others. The application of the amended version of the Rule affected his "appointment status", and so he maintains his complaint is receivable under Article II, paragraph 5, of the Tribunal's Statute. Furthermore, in breach of Article VIII 8.1 of the Staff Regulations, the amendment to Rule 1020.1 was made without any consultation with staff members.

He asks that the notional date of his retirement be set at 30 September 1999 when he will attain the age of 62, and also claims 10,000 United States dollars in costs.

C. In its reply the Organization argues that the complaint is irreceivable. The complainant is challenging a general decision but no individual decision exists against him that would put the general one into effect. There could be none as he was dismissed from service before the age of retirement: therefore he shows no cause of action. Even if it were shown that an internal appeal could be filed against the amendment in Rule 1020.1, the complainant filed his appeal to the regional Board more than seven years after the amendment was notified to him and it was accordingly out of time. In its view the complainant was not challenging any earlier administrative decision connected with his appointment status, but was asking for a new "notional" decision to be taken.

On the merits the Organization submits that the decision not to apply the amendment retroactively was not arbitrary: it took account of staff members' existing rights. The complainant was not the victim of unequal treatment. At the time of his recruitment in 1988 he was subject to the former version of the staff rule that set the retirement age at 60, and was in a different position from staff recruited later who had become participants in the Pension Fund after January 1990. In view of the frivolous nature of the complaint it asks for an award of nominal costs against the complainant.

D. In his rejoinder the complainant presses his pleas. He argues that he appealed against the general decision when he was likely to be affected by it personally. He asked the Organization to extend notionally to him the benefit of the raised retirement age in the event that the case he filed with the Tribunal against his dismissal would not be resolved before he reached the retirement age of 60. Any appeal made thereafter would have been out of time. He could not have contested the decision earlier as it was a general decision which had not been communicated to him personally.

E. In its surrejoinder the Organization maintains the arguments developed in its reply. In its view the complainant is in effect asking for application to him of an amendment that he considers to be illegal.

It points out that all staff members, including the complainant, were notified of the amendment to Rule 1020.1 in July 1990 and were provided with the text of the new Rule. Staff had been consulted beforehand: through their participation in such bodies as the United Nations Joint Staff Pension Board, representatives of the personnel had had the opportunity to take part in the discussion leading to the amendment.

CONSIDERATIONS

1. The complainant entered the service of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi in 1988. He was dismissed for misconduct after having failed to provide a satisfactory explanation of why he had produced two altered receipts in support of a claim for the reimbursement of his son's dental treatment in the United States. His dismissal took effect on 5 August 1996.

2. On 29 April 1998, the complainant lodged a complaint against the decision to dismiss him.

3. On 27 June 1998, he lodged the present complaint, in which he seeks to have the date of his retirement fixed at 30 September 1999. He indicates that the present complaint was lodged in case the Tribunal allowed his complaint of 29 April 1998.

4. In Judgment 1856, delivered on 8 July 1999, the Tribunal dismissed his complaint of 29 April 1998. It thereby confirmed the administrative decision to dismiss the complainant for misconduct, with effect from 5 August 1996.

5. The present complaint therefore shows no further cause of action.

6. The Tribunal holds that, in the circumstances of the case, there are no grounds for allowing the Organization's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organization's counterclaim are also dismissed.

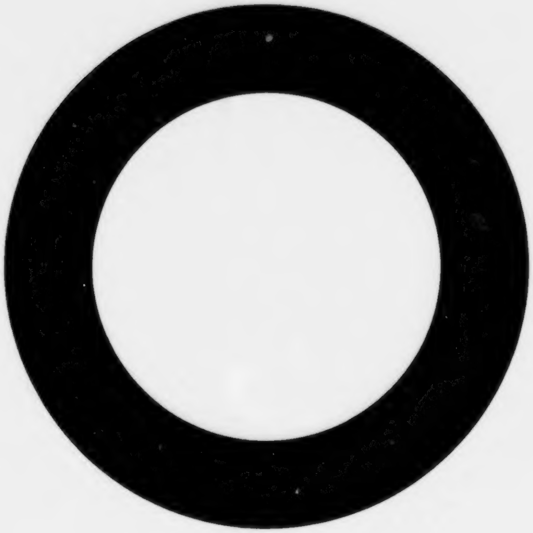
In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET



Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

In re Masens (No. 4)
(Application for review)

Judgment 1944

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1700 filed by Miss Liana Yvonne Masens on 20 February 1999 and corrected on 16 May 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant has already applied on two occasions for review of Judgment 1700 of 29 January 1998, which dismissed as irreceivable the complaint which she had filed against the United Nations Industrial Development Organization (UNIDO) challenging the Director-General's decision to place her on special leave. In Judgment 1751 of 9 July 1998, the Tribunal dismissed a first application for review as being clearly irreceivable on the grounds that the complainant had failed to show any mistake of fact warranting review. In Judgment 1799 of 28 January 1999, the Tribunal dismissed a second application for review, which it also found to be clearly irreceivable on the grounds that the alleged new facts cited by the complainant were not matters warranting review of its judgment.

2. In her third application for review, the complainant produces documents which, she says, are inexact and incorrect and misrepresent her service with UNIDO. She once again challenges the conditions under which her services were terminated. None of these arguments warrants a review of Judgment 1700. With regard to her claims for the cancellation of the documents which she considers to be incorrect, the correction of certain errors and the granting of various sums corresponding to the taxes which she had to pay in the United States and the moral damages which she suffered, the Tribunal finds that they are irreceivable because they do not challenge prior decisions by UNIDO which were contested within the time limits.

3. In these conditions, the application for review is clearly irreceivable and must be dismissed in accordance with the summary procedure in Article 7 of the Rules of the Tribunal.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-EIGHTH SESSION

***In re* Palma (No. 10)**

Judgment 1945

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 16 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. On 9 April 1998 the complainant wrote to the Director General asking him to provide "a decision of condemnation of the misrepresentations made by [the] Organisation in the course of the Judgment 1718 of 29.1.1998, by bringing consequently an official public excuse to the ILO Administrative Tribunal and to me in person".

2. Having received no reply the complainant filed a complaint with the Tribunal on 16 July 1998 against an implied negative decision.

3. The Tribunal under Article II(5) of its Statute is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of the Organisation.

4. Consequently, the Tribunal has no power to quash an implied decision of the Director General refusing to condemn the Organisation and is not competent to grant the complainant the relief which he claims.

5. The complaint is clearly irreceivable and must be dismissed in accordance with the summary procedure provided for by Article 7 of the Tribunal's Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Sondo**

Judgment 1946

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Moussa Sondo against the World Health Organization (WHO) on 9 October 1998 and corrected on 20 July 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. On a date which it has not been possible to determine, the complainant, a citizen of Burkina Faso, born in 1943 and a former staff member of the World Health Organization (WHO), posted an unregistered letter in Ouagadougou containing a complaint bearing the date 10 September 1998, addressed to the United Nations Administrative Tribunal and made out on an official form of the Administrative Tribunal of the International Labour Organization (ILOAT). He challenged the non-renewal of his contract, which had expired in March 1990, and alleged discrimination by the Organization in the classification of his post. He produced a copy of a decision of the Director of the Onchocerciasis Control Programme in West Africa on 14 January 1998 refusing to grant him damages. When correcting his complaint, he produced a receipt for mail sent on 15 April 1998 to the "WHO post BAG n°. BE 773 Belvédère

Harare – Zimbabwe"; in which he stated that he had appealed to the regional Board of Appeal. However, he stated that he had not received any reply and was therefore turning to the Tribunal. At a later date, he produced a copy of his appeal to the regional Board of Appeal, dated 22 March 1998. The letter accompanying the complaint, dated 10 September 1998, is addressed to the "Registrar of the United Nations Administrative Tribunal, Palais des Nations Unies ... Geneva". This communication, which was really intended for the ILOAT, reached the Palais des Nations in Geneva, which transmitted it to the United Nations Administrative Tribunal in New York. As certified by the Registrar of that Tribunal, the complainant's communication was received on 9 October 1998. The complaint was then forwarded to the ILOAT. It was not possible to relocate the original envelope containing the complaint, nor was it possible to determine when the complaint was posted in Ouagadougou, nor when it reached the United Nations Office at Geneva. Invited to provide evidence of the date of despatch of his envelope in Ouagadougou, the complainant admitted that he was unable to do so.

2. Under Article VII, paragraph 1, of the Statute of the Tribunal, "a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". On this point, Section 12 of the WHO Staff Rules (Staff Rules 1210 to 1250) indicates the manner in which a staff member may appeal against a decision taken by a Regional Director, by making an appeal at the regional level and then, if necessary, by appealing to the headquarters Board of Appeal, which makes a recommendation to the Director-General for a final decision. The Staff Rules also indicate precisely the time limits within which staff members must appeal to the Board of Appeal concerned (Staff Rules 1230.8.3 and 1230.8.5). The Board of Appeal must report its recommendations (Staff Rule 1230.3.3) to the appropriate director, who must reach a decision on them (Staff Rule 1230.3). In the present case, the complainant invokes the alleged failure to act of a lower body in the Organization's hierarchy. As he did not raise that issue during the internal appeal procedure he has not exhausted the internal means of redress. The implicit decision to dismiss his internal appeal was not therefore final: see,

on this subject, Judgments 1404 (*in re* Rwegellera) and 588 (*in re* Ido). Consistent precedent has it that only in exceptional circumstances may the requirement to exhaust the internal remedies be set aside, and only in cases where on the evidence the Organization seems unlikely to reach a decision within a reasonable time. However, it is neither alleged nor demonstrated that such is the case and that the steps taken by the complainant to obtain a response would have been certain to fail. The complaint is, therefore, clearly irreceivable and must be dismissed in accordance with the summary procedure in Article 7 of the Rules of the Tribunal.

3. It is not therefore necessary to examine whether it was filed in time, under Article VII, paragraphs 2 and 3, of the Statute of the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-EIGHTH SESSION

***In re* Verdrager (No. 10)**
(Application for review)

Judgment 1947

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr Jacques Verdrager on 28 May 1999 for review of Judgment 325;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant has filed a seventh application for review of Judgment 325, delivered by the Tribunal on 21 November 1977 in which it dismissed his complaint against the World Health Organization (WHO). The Tribunal has also dismissed the complainant's six applications for review of that judgment.

He indicates that the new application for review has been filed for three reasons:

- the recent publication of the judgments of the Tribunal on the Internet;
- the new rulings concerning the application for review (previously based on the discovery of some "new" fact);

- the election of a new Director-General of the Organization who has given priority to malaria and has insisted that the WHO must become more accountable and more transparent.

2. Consistent precedent has it that:

> "Neither the Statute nor the Rules of Court permit an application for review of a judgment of the Administrative Tribunal. The Tribunal may therefore declare such an application receivable only in quite exceptional circumstances, for example when new facts of decisive importance have come to light since the date of the judgment." (See Judgment 350, *in re* Verdrager No. 2, first paragraph.)

Contrary to the complainant's contentions, this case law is still applicable and the discovery of a new fact is still required for an application for review to be declared receivable by the Tribunal.

3. The Tribunal holds that neither the publication of its judgments on the Internet nor the election of a new Director-General of the WHO are new facts which would warrant a review of the original judgment.

4. For the rest, in support of his conclusion that Judgment 325 appears to be a perfect example of a judgment based on errors and mistakes, the complainant confines himself to developing on the issues already examined in his initial complaint and in his successive applications for review.

In this respect, it may be recalled that in Judgment 504 (*in re* Verdrager No. 6), delivered on 3 June 1982, the Tribunal expressed the belief that it had:

> "fully explained its reasons for rejecting the pleas for review the complainant has already submitted. If he makes any further application which is based on the same pleas, it will simply be dismissed as *res judicata*."

As no new fact has been discovered since the complainant's previous application for review, the present application must be dismissed in accordance with the summary procedure in Article 7 of the Rules of the Tribunal.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

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